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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

BY RICHARD W. GILL,
CLERK OF THE COURT OF APPEALS,

AND

JOHN JOHNSON,
ATTORNEY AT LAW.

VOL. VIII.
CONTAINING CASES IN 1836-7.

MEDLOCK & ALLEN

BALTIMORE:
JOHN D. TOY, PRINTER.

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NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.

Hon. JOHN STEPHEN, Judge.

Hon. STEVENSON ARCHER, Judge.

Hon. THOMAS BEALE DORSEY, Judge.

Hon. E. F. CHAMBERS, do.

Hon. ARA SPENCE, do.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles and Prince George's* counties.

Hon. JOHN STEPHEN, Chief Judge.

Hon. EDMUND KEY, Associate Judge.

Hon. CLEMENT DORSEY, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne and Talbot* counties.

Hon. E. F. CHAMBERS, Chief Judge.

Hon. PHILEMON B. HOPPER, Associate Judge.

Hon. JOHN B. ECCLESTON, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel and Montgomery* counties.

Hon. THOMAS BEALE DORSEY, Chief Judge.

Hon. THOMAS H. WILKINSON, Associate Judge.

Hon. NICHOLAS BREWER, JR. do. appointed 18th October,
1837, vice The Hon. Charles J. Kilgour, deceased.

NAMES OF JUDGES, &c.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester counties.*

Hon. ARA SPENCE, Chief Judge.

Hon. WILLIAM TINGLE, Associate Judge.

Hon. BRICE J. GOLDSBOROUGH, Associate Judge.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany counties.*

Hon. JOHN BUCHANAN, Chief Judge.

Hon. ABRAHAM SHRIVER, Associate Judge.

Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford counties.*

Hon. STEVENSON ARCHER, Chief Judge.

Hon. RICHARD B. MAGRUDER, Associate Judge.

Hon. JOHN PURVIANCE, do.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. ALEXANDER NISBET, Associate Judge.

Hon. W. G. D. WORTHINGTON, do.

ATTORNEY GENERAL.

JOSIAH BAYLEY, Esquire.

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

June Term, 1836.

JAMES STEWART'S LESSEE vs. ROBERT JONES, of GEORGE.
E. S. June, 1836.

J. S. died in 1797, intestate, and seized of two parcels of land, which had descended to her from her father, leaving an only brother, her heir at law. Upon his death without issue, and intestate, it was *Held*, that though the descent from his sister to him was an immediate descent, according to the principles of common law, it was also mediate from the father, from whom the brother derived his inheritable blood; and was therefore a descent upon the part of the father, and embraced by the act of descents of 1786, ch 45. Though according to the principles of the *English* law of descents, the descent from brother to brother is immediate, and title may be made by one brother to another, without mentioning their common ancestor; yet such ancestor is regarded as the fountain of inheritable blood, and consequently the descent is mediate from him.

The legislature of this *State*, by the act of 1786, ch. 45, changed the *English* common law of descents in many of its essential features, and imparted new inheritable capacities unknown to that law. On failure of lineal heirs in the descending line, if the estate descended to the intestate on the part of the father, it directs that it shall descend to the brothers and sisters of the blood of the father, without discriminating between the whole, and the half bloods; showing manifestly, that though the descent is immediate from the person who died seized, the inheritable blood is derived from the ancestor, from whom the estate descended to such person.

Stewart's lessee vs. Jones.—1836.

Distinction pointed out between the case of *Stewart's lessee vs. Evans*, 3 Har. and Johns. 287, and *Hall vs. Jacobs*, 4 Ib. 245, and the decision in the latter case, shown to be founded upon the circumstance, that the estate was acquired by purchase, by the party from whom the descent was traced

APPEAL from *Somerset* county court.

This was an action of *Ejectment* for a tract of land called “*Dashiell's Lot*,” lying in *Somerset* county, containing seventeen hundred and forty acres, and a tract called “*Stevens' Folly*,” brought on the 26th August, 1833, by *James Stewart*, as lessor of the plaintiff against *Robert Jones*, of *George*, the tenant in possession. The 1st count was for an entirety, the 2nd for an undivided moiety, and each was upon a demise from the 31st December, 1832. The defendant pleaded not guilty.

At the trial of the cause, the plaintiff to support the issues on his part, offered and read in evidence to the jury three statements of facts, signed by the counsel for both plaintiff and the defendant, which were as follows, to wit :

“In this cause it is admitted, that a certain *Col. John Stewart*, of *Somerset* county in the *State of Maryland*, in his life-time, was seized and possessed in fee of the land in the declaration mentioned, and being so seized and possessed thereof, in the year 1794, died intestate, leaving a son called *Alexander*, and a daughter called *Jane*, of full age, his only children and heirs at law ; that the said *Jane*, after the death of her father, employed an overseer and cultivated the said land, and received the issues and profits thereof until her death ; that the said overseer acted and managed the said land entirely under her direction, without the control or interference of any other person, and the wages of the overseer and expenses of iron work, in carrying on the said farm were paid by the said *Jane*, during her life-time. That her brother *Alexander Stewart*, after the death of his father and during the life-time of the said *Jane*, held and occupied all the other lands, of which the said *Col. John Stewart*, his father, died seized and possessed, of greater value, and cultivated the same, and received the issues and profits thereof.

That the said *Jane*, sometime in the year 1797, died in possession of the said land as above stated, intestate and without issue. That upon the death of the said *Jane*, the said *Alexander* her brother, entered upon and took possession of the said lands called "*Dashiell's Lot*," and "*Stevens' Folly*," and being so seized and possessed thereof, and also of divers other lands, died intestate in the month of July, 1810, leaving the following collateral relations on the part of his said father, to wit: children and descendants of *William Stewart*, deceased, who was the only brother of the said *Col. John Stewart*, the intestate's father, to wit: *John Stewart* his oldest son, now dead, *Betsey Evans* his daughter, and wife of *James Evans*, *William Stewart*, *Nancy Stewart*, *Molly Dashiell*, and *Robert Stewart*, sons and daughters of the said *William*, the uncle of the intestate; all of whom except *John*, the eldest son are admitted to be in full life. Also the descendants of *Betsey Wailes*, a deceased aunt of the intestate and sister of the said *Col. John Stewart*, to wit: *Helena Collier*, her daughter, and *Daniel Wailes*, *John Wailes*, and *Betsey Bounds*, her grandchildren, who are admitted to be living; also the descendants of *Nancy Porter*, a deceased aunt and sister of *Col. John Stewart*, to wit: *Clement*, *David*, and *Levi Cathell*, and others, her grandchildren who are also admitted to be living; and also the descendants of *Sarah McMurray*, a deceased aunt, a sister of the said *Col. John Stewart*, to wit: *William Russell*, *Josiah Russell*, and others, her grandchildren, who are also admitted to be living. That the said *James Evans*, husband of the said *Betsey Evans*, previous to, and at the death of the said *Alexander*, superintended and acted as overseer for the said *Alexander*, residing in the mansion house on the said lands, with his said wife and family, and after the death of the said *Alexander*, continued with his wife and family to reside on, cultivate, and possess the said lands, and to receive the profits thereof until the year 1814, and after that time the said lands have been held and possessed by *George Jones*, of *Robert*, and since his death by the defendant. That after the death of the said *Alexander*,

the said *James Evans* and wife, being in possession of said lands in the declarations mentioned, claiming the same on behalf of themselves, and the aforesaid collateral relations of the said *Alexander*, as heirs of the said *Alexander*, under the act of Assembly to direct descents, the aforesaid *John Stewart*, father of the said *James Stewart*, the lessor of the plaintiff, at April term, 1811, of *Somerset* county court, instituted an ejectment against the said *James Evans*, for the recovery of the same land, as heir at common law of the said *Alexander*, and at the same term judgment of *non pros.* in the said suit was entered against him in favour of the said defendant. That from the said judgment so as aforesaid rendered in the county court, the plaintiff appealed to the Court of Appeals, and at June term of said court, in the year 1812, the said Court of Appeals affirmed the said judgment. And it is agreed, that the record in said case in said Court of Appeals is to be taken and considered as a part of this statement of facts. And if this case should go to the Court of Appeals, the said original record may be read as a part of this agreement. It is further agreed that the said *John Stewart*, father of the said *James Stewart*, lessor of the plaintiff, died sometime in the year 1817; that *James Stewart*, lessor of the plaintiff is the oldest son of the same *John Stewart*, deceased, who was the eldest son of the said *William Stewart*, deceased, who was the only brother of the said *Col. John Stewart*, deceased, who was the father of the said *Alexander Stewart*, the intestate.

It is further agreed, that the defendant may under the issues joined, and without surveys, plats, or locations, give evidence of the possession (of himself, of the said *George Jones*, and those under whom he claims,) of the said lands, so as to avail himself of limitations as a bar to the plaintiff's recovery. And it is further agreed, that each party shall be at liberty to offer any further or additional testimony in this cause, notwithstanding, this statement and agreement. And it is further admitted, that it was proved by a competent and credible witness, at the trial of this cause, that the sale

of the said *Alexander Stewart's* lands, was made by the said commissioners in October, 1813. It is further admitted, that the said lands in the said declaration mentioned, have been enclosed by fence, continually, from the time of the death of the said *Alexander Stewart*, to the present time. That after the said decision in the said Court of Appeals made at June term of said court, in the year 1812, *Helena Collier*, one of the collateral relations of the said *Alexander*, filed a petition in *Somerset* county court, for a division or sale of the real estate of the said *Alexander*, under the provisions of the act of Assembly to direct descents; that in the said petition the collateral relations of the said *Alexander*, are particularly enumerated and are the same as hereinbefore set forth; that on the 27th October, 1812, a commission issued upon order of court pursuant to the prayer of the petitioner to five commissioners, to wit, &c., to make a division of the said *Alexander Stewart's* real estate, among the aforesaid collateral relations according to their respective proportions, or in the event of the said estate not admitting of such division without loss and injury to all the parties entitled, then to put a valuation upon the same, and make a report of their proceedings to the said court. That the said commissioners having first qualified, entered upon the said commission, and on the 6th of November, 1812, reported to the said court, that the said real estate of the said *Alexander*, would not admit of division among the several and respective heirs at law of the said *Alexander*, without loss and injury to all the parties entitled, which said report and judgment of the said commissioners was finally ratified and confirmed by the said court. And the several heirs entitled to take the estate at the valuation of the commissioners, having refused to take the same in open court, it was ordered by the court, that the said commissioners make sale of the said real estate. And it is further admitted, that the said commissioners did make sale of the said real estate, and that a certain *George Jones, of Robert*, became and was the purchaser of the lands in the declaration mentioned, at the said sale, at and for the sum

of \$12,738 46 $\frac{3}{4}$, that he complied with the terms of sale and gave his bond according to the order of the court, and afterwards paid the full amount of said purchase money. That on the 5th of April, 1814, the said commissioners made report of the said sale, and that the same was afterwards by the said court ratified and confirmed in all things at November term, 1814, no objections, &c. That after the said sale the said *James Evans and wife*, on behalf of themselves and the other collateral relations of said *Alexander*, delivered the possession of the said land to the said *George*, who occupied and possessed the same, until some time in March, 1830, when he died. That the said *George*, previous to his death conveyed the said land to the defendant in this cause who is his son, and who resided upon the said lands at the time of his said father's death, and who immediately upon his said father's death took possession of the same, and was seized and possessed thereof, and has continued so seized and possessed thereof until the present time.

It is further admitted in this cause, in addition to facts already admitted, that *John Stewart*, the father of the lessor of the plaintiff, soon after the decision in the Court of Appeals, in June, 1812, in the action of ejectment brought by him against *James Evans*, gave his consent that *Helena Collier*, one of the heirs of the said *Alexander Stewart*, under the act to direct descents, should file a petition for a division or valuation of said *Alexander's* real estate among his heirs at law, under the said act to direct descents that the said petition was filed with the knowledge, approbation and consent of said *John*, who was represented in said petition as one of the heirs of said *Alexander*, under the said act to direct descents, being the same proceeding which is referred to in the statement of facts in this cause heretofore agreed to. That the said *John*, was a party to said proceeding. That from the time of the aforesaid decision against him in the Court of Appeals, he acquiesced in the claim set up by the collateral relations of the said *Alexander*, that they were the heirs at law of the said *Alexander*, under the said

act to direct descents, of the lands in the declaration mentioned. That a certain *Benjamin Dashiell*, of *Somerset* county and *State of Maryland*, and his wife *Matty*, who was a daughter of *William Stewart*, deceased, who was the only brother of the said *Col. John Stewart*, deceased, who was the father of the said *Alexander Stewart*, the intestate, were also made parties to the said proceeding for the division or valuation of said *Alexander Stewart's* real estate. That when the lands in the declaration mentioned, were sold by the said commissioners, the said *John Stewart*, the plaintiff's father, was present and acquiesced in said sale. That the said *John Stewart*, after the aforesaid decision in said Court of Appeals, contracted with the said *Benjamin Dashiell*, by parol without writing, to sell him and his heirs all his, the said *John Stewart's* estate, of, in and to the said *Alexander's* real estate, as hereinafter stated, and that the said *Benjamin Dashiell*, in fulfilment of his said contract, paid the said *John Stewart*, the sum of fifteen hundred dollars in full of said purchase, and directed the said commissioners to place his, the said *John Stewart's* share of the said *Alexander Stewart's* real estate to the use, credit and benefit of said *Benjamin Dashiell*, in their return of the proceedings under said commission. That in pursuance of said direction, the said commissioners did in their return of proceedings dated April 5th, 1814, return that the said *Benjamin Dashiell*, was entitled in right of his wife *Matty*, daughter of the said *William*, and also *John Stewart's* part by his direction, making two-fifths of the one-fourth of said estate, amounting to \$3,111 67½. That in consequence of the said sale so as aforesaid made by the said *John*, to the said *Benjamin*, and the payment of the purchase money by him as aforesaid, the said commissioners apportioned the said *John's* share of the said estate to the said *Benjamin*, and that the same was subsequently paid to him the said *Benjamin*, by the purchasers of the said real estate. It is further admitted, that the said *John Stewart*, never did from June, 1812, set up or claim any title of the lands in the declaration mentioned, as heir

at common law of the said *Alexander*. It is also admitted, that the said *Matty Dashiell*, wife of the said *Benjamin Dashiell*, departed this life in the year 1821. It is further admitted that the said *Benjamin Dashiell*, and *Matty* his wife, acquiesced in and consented to the possession of the said *George Jones*, of the said lands. It is further admitted, that the said defendant in this action claims and holds the said lands from the said *George*, and that the said *George*, claimed and held the same in and by virtue of the aforesaid sale made by said commissioners. It is further admitted, that the aforesaid contract, sale and payment of the said *Benjamin*, to and with the said *John*, was in the spring of 1813. It is further admitted, that at the time of the said sale of the said *John* to the said *Benjamin*, both the said *John* and *Benjamin*, believed the said *John*, was not entitled to said lands as heir at common law.

It is also admitted in this cause, that *John Stewart*, the plaintiff's father, duly executed his last will and testament, on the 27th day of January, 1816, and died without revoking the same, and which after his death to wit: on the 23rd day of July, 1817, was duly admitted to probat and record, and which said last will and testament ensues in the following words, to wit:

“In the name of God, Amen. I *John Stewart*, of *Somerset* county and *State of Maryland*, do make this my last will and testament in manner and form following, to wit: I give and devise the houses and lot which I purchased of *Mr. John H. Bell*, in *Princess Ann*, with all the lands which I purchased of *Mr. Isaac Polk*, to my son *James Stewart*, his heirs and assigns forever; also my negro man *Tom*, and boy *Hamilton*, with all the stock and farming utensils which I gave him after his marriage. I give and devise the residue of my estate, both real and personal to my wife, *Jane Stewart*, and my son, *James Stewart*, or the survivor of them, in trust for my wife, *Jane Stewart*, and my daughters, *Elizabeth*, *Nelly*, *Matilda*, and *Nancy Stewart*, to be equally divided between them and their heirs forever, with full power in my said trus-

tees to rent, sell, dispose of, and convey the whole or any part thereof, as they shall deem most to the advantage of my said wife and daughters. I hereby appoint my wife, *Jane Stewart*, and my son, *James Stewart*, executors of this my last will and testament, revoking all former wills by me made, ratifying and confirming this to be my last will and testament," &c.

It is also further admitted, that the lands and real estate devised to *James Stewart*, by the said *John*, in the above last will and testament, described as the lot purchased of *Mr. John H. Bell*, and the lands purchased of *Mr. Isaac Polk*, are not the same lands and real estate mentioned in the plaintiff's declaration.

Whereupon the plaintiff by his counsel prayed the opinion of the court and their direction to the jury, that if they believed the testimony offered in evidence as above, that *Alexander Stewart*, was entitled to an undivided moiety of the lands mentioned in the declaration, to wit: "*Dashiell's Lot*" and "*Stevens' Folly*" of which his sister, *Jane*, died actually seized and possessed, by descent as heir to her; and that on the death of *Alexander*, the inheritance devolved on the lessor of the plaintiff, as heir at common law, and is not embraced in the act of Assembly, 1786, ch. 45. Which opinion and direction the court *pro forma* refused to give, whereupon the plaintiff by his counsel excepted.

It is agreed by the counsel in this cause, that if the judgment of court as expressed in this bill of exceptions, should be reversed, a *procedendo* shall be awarded for a new trial.

The verdict and judgment being for the defendant, the plaintiff prosecuted this appeal.

The case was argued before BUCHANAN, Ch. J. and ARCHER, DORSEY, and STEPHEN, Judges.

R. N. MARTIN, for the appellant, contended :

There was but one material question in the cause, which was, whether an estate which descended from a sister to a brother, of which the brother died seized and intestate, was

embraced by the act of 1786, ch. 45, to direct to descents; or descended as at common law. This question depended upon the construction of that act, and it comes up in an action of ejectment, instituted to recover an undivided moiety of two tracts of land. The plaintiff counts upon two demises, one for an entirety, and one for an undivided moiety, and the facts are stated in the bills of exception, which show that *Alexander Stewart* died last seized, and that the proceedings upon a partition then referred to, were never completed, as the commissioners never executed any deed.

The present plaintiff must recover as the heir at law of *Alexander Stewart*, who died last seized. The prayer presented to the county court includes three propositions:

1. Upon the death of *Jane Stewart*, the moiety of which she was possessed, descended upon *Alexander*, as her heir.

2. That *Alexander's* estate being derived by descent from his sister, descended according to the principles of the common law.

3. If the estate descended at common law, then the lessor of the plaintiff is entitled as heir to *Alexander*, the party last, actually seized.

In the last proposition, the father of the lessor of the plaintiff is not regarded. He is passed by, never having been seized in fact.

The first proposition does not admit of dispute. Upon the death of *Col. John Stewart*, the estate descended to his two children, as tenants in common. There was no partition, but *Jane* died in possession of a moiety. It is true, her estate descended to her, on the part of her father, but when she died seized, she became the new stock. The root of a new stock, and on her death it descended from her, to her brother, as heir to her at common law. In tracing the descent, the court will not look beyond her; the mode of its acquisition by her is immaterial. It is the person last actually seized, from whom the inheritance is to start.

2. This case is not embraced by the act of 1786, ch. 45. A descent from sister to brother, is not governed by it, but by

the rules of the common law, as if that act had not been passed. That act only provides for three classes of cases: 1st. Estates descended on the part of the father. 2d. On the part of the mother. 3d. By purchase; and two rules of interpretation apply to that act. When legal terms are used, they are to be understood in a legal sense; technically, the words "purchase," and "on the part of," used in the act of 1786, are to be construed as at common law. *Barnitz's lessee vs. Casey*, 7 Cranch, 468. *Hall vs. Jacobs et al, lessee*, 4 Har. and John. 254. And the other rule is, that although it may be granted, you must follow the intent of the framers of the act, still it is the intent discoverable in the language of the act, and not in fancy or conjecture. You may suppose the framers masters of the language used, and that they intended to provide a scheme of descents as comprehensive as new, still the court is confined to the language used. Some persons have supposed that this act, was meant to tear up every fibre of the feudal system, as wrong in principle, and partial in practice; and this may be so, yet if the language of the act falls short of the design, the court cannot remedy the defect. This cause does not belong to the third class. It did not vest by purchase, nor did it descend on the part of the mother. Then the only inquiry is, did the estate of which *Jane*, died seized, descend to *Alexander*, on the part of the father. Descents between brother and brother must be examined into. These are direct, immediate descents, at common law, and are not *by* or *through* the father. So far as such inheritances are concerned, the father is not regarded. He is not the stock from which the inheritance descends. So if the father was attainted, the land will still descend from brother to brother, when it cannot go through the father, who in such case is the stock of consanguinity, and not of descent. *Hall vs. Jacobs et al, lessee* 4 Har. and John. 256. *Barnitz's lessee vs. Casey*, 7 Cranch, 468. 3 Salk. 129. 1 Ventris, 416. *Seisina facit stipitem*. This rule makes *Jane*, the stock from which the inheritance descends. The question under consideration, has been decided in the

cases from *Harris and Johnson and Cranch*, above cited; and yet I admit that in the case of *Stewart's lessee vs. Evans*, 3 *Har. and John*. 287, it has been decided, that a descent from a sister to a brother is within the act of 1786; but I assume, that the case last cited was an erroneous exposition of the statute. It is condemned by the common law, and overruled by the case in 4 *Har. and John*. 256. The decision of this court in 3 *Har. and John*. 287, does not operate as a bar in this cause, and if the law is erroneously announced, then this court will correct it. The court is not conclusively bound by the former opinion. *Hammond vs. Ridgely*, 5 *Har. and John*. 245. If the first proposition be established, the lessor of the plaintiff claims as heir of the person last actually seized of the estate, which is the doctrine of the common law. 7 *Har. and John*. 2, note (a.) *Chirac et al, vs. Reinecker*, 2 *Peters*, 625. 4 *Kent*, 381, 385. *Jackson vs. Hilton*, 16 *John*. 96. *Jackson vs. Hendricks*, 3 *John*. cases, 214. 2 *Blk. Com.* 146. *Bates vs. Shraeder*, 13 *John*. 260. *Harris et ux, vs. Prichard*, 2 *Wils.* 45. There was no actual *seizin*, on the part of the father of the lessor of the plaintiff at any time, and so is the proof. He failed in a former action of ejectment for the same premises. The possession of his collateral relations was not his possession. The court cannot assume they were his tenants in common, and the *seizin* of one of those relations is not the *seizin* of the others. In short, the success of this cause depends upon how far the court is bound by the case in 3 *Har. and John*. It is in direct conflict with the subsequent case of *Hall and Jacobs*, which overrules it.

W. H. COLLINS, for the appellee.

The argument on the other side, and the success of the plaintiff's cause assumes.

1. That the case of *Stewart and Evans*, 3 *Har. and John*. 287, is not law.

2. That *Captain John Stewart*, was never seized so as

to make him a *stirps* or ancestor ; that there is no evidence of his entry on the lands claimed.

3. That the proceedings under the commission to effect a partition was not valid, so as convey title to the person who purchased under it.

Upon the last point, it is supposed, that the question of title under the commission is not now in the cause. The evidence is all from the plaintiff. The prayer assumes, that the inheritance descended on the death of *Alexander*, to the lessor of the plaintiff, yet the record shows that his father, *John Stewart*, survived *Alexander*. This prayer then asks the court to say, that in the interim nothing occurred to shew an entry by *John*, or that the proceeding by commission was legal and passed his estate ; that the mistake was merely in the distribution of the proceeds, and that the title still passed to *James*. This brings us to consider the act of 1786, ch. 45, sec. 8. In this act the legislature show they know the meaning of the word *seizin*. The act embraces all *seizins*. *Captain John Stewart*, had a *seizin in law*. But on the other side it is assumed, the act of 1786, meant only a *seizin in fact*, and that the term is used in the same sense as in the rule *seisina facit stipitem*. In the act of 1786, jurisdiction is given to divide the land, in case the parties *entitled* cannot agree upon a division. Does the word *entitled*, mean a *seizin in deed* ? The ancestor must be seized in fact, but his heirs are only to be entitled, and that looks merely to the legal title. It is enough if the proceedings which pass the title include the parties *entitled*, in its popular acceptation. There is no *casus omissus*, in the 8th sec. and then although *Captain John Stewart*, had a moiety of the estate at common law, and one-twentieth of a moiety under the act to direct descents, both estates are within the 8th sec. of the act of 1785, ch. 45, and operated upon by the commission. Such an estate is within the mischief to be remedied. It was impossible that the commissioners could act upon any undivided interest in an estate, without acting upon the whole. When they acted upon his one-twentieth

of an undivided half of the land, they necessarily acted upon his undivided half, of the same land. I conclude, that the commissioners had jurisdiction without a *seizin* in deed by all the heirs, to divide the estate, or sell it, in case a division could not be had; and this without disturbing the rule that a *seizin in fact*, is necessary to make an ancestor. If the proceedings were regular they passed the title. But it is objected, the commissioners executed *no deed* to the purchaser. In the case of a sheriff's sale, a deed is not necessary. *Barny vs. Patterson*, 6 *Harr. and John*. 182. A change of property is effected without a deed, by the legal effect of the proceedings. *Fenwick vs. Floyd's lessee*, 1 *Har. and Gill*, 172. *Boring's lessee vs. Lemmon*, 5 *Har. and John*. 223. *Massey vs. Massey's lessee*, 4 *Har. and John*. 141. *Hammond et al, vs. Stier*, 2 *Gill and John*. 81. *Stevens vs. Richardson*, 6 *Har. and John*. 156, 258. *Leadenham vs. Nicholson*, 1 *Har. and Gill*, 267. *Hurt vs. Fisher*, *Ib.* 88. Also in cases of election. A compliance with the terms by the husband of one of the heirs, vests the fee in him without deed.

It might have been inferred in this case, that a deed had been made and the form of the prayer took the question from the jury. The proceeding by commission was proper, and the only mistake was in the distribution of the proceeds of sale. It is a judicial sale, and the purchaser is not to look to the application of the purchase money.

We are now to consider three cases, that of *Stewart vs. Evans*, 3 *Har. and John*. 287. *Hall vs. Jacobs*, 4 *Har. and John*. 287, and in 7 *Cranch*. They are all correctly decided and consistent.

In the case in 3 *Har. and John*. the descent was as here, and the court there say, that *Alexander's* whole estate descended under the act of 1786. But in the case of 4 *Har. and John.*, *Jacobs*, the elder, devised his estate before the act of 1786. The court decided it to create an estate by purchase. And as the brother took an estate of that character, and not by descent, it was held a *casus omissus*, in the rules

of descent prescribed by the act. The case of 7 *Cranch*, was a descent from half blood to half blood, against all the rules of the common law; and in these particulars, the two cases differ from the decision in 3 *Har. and John.*, and like the common law, takes a distinction between purchased and descended property, the mother's relations never inheriting the latter where derived *ex parte paterna*. The effort of counsel, also was to get up a constructive descent; but neither in the case in 3 *Har. and John.* nor in this, is there any necessity for it, as in both there was an actual descent. Technical terms are to be preserved, and the technical meaning of the terms "on the part of the father" maintained. These are common law terms. 2 *Tho. Co.* 169, 170, *No. O.* when an estate has really descended on the part of the father, the strict feudal law is preserved. Descents on the part of the father flow from him either, mediately, or immediately. You trace the history of the fee, and if no other title intervene, the blood of the ancestor takes. But the estate by purchase has a more fluctuating quality. It goes either to the father or mother; yet if the history of the fee can be traced, the blood of the first purchaser takes. 2 *Black.* 220, 223. The law follows the fact. An ancient fee, none but the blood of the first purchaser can take. If it be *antiquum* by fiction, the mother's blood may inherit, and this rule distinguishes this cause from 4 *Har. and John.* 245, and also 7 *Cranch*. This is a feud *antiquum et veterum*, a line of unbroken descents *ex parte paterna*, 2 *Thos. Co.* 170, *No. 20*. The touchstone is, can the father or mother take the property. It is one of the dividing points of the law, and this answers any supposed discrepancy between the case in 3 *Har. and John.* 287, and 7 *Cranch*. The courts deciding those cases have placed them on that very doctrine. The language in *Cranch*, refers to an estate by purchase; it is guarded, and if an authority were wanting to show the question now under consideration, to be open, it would be found there; moreover, its language must be limited to the special circumstances of the case. So when the judge speaks of a

descent from brother to brother as an immediate descent, he means of an estate acquired by purchase. Any other construction would make him depart from the whole line of his argument, the facts of the cause, the reason of the thing, and the principles of the common law. There is nothing new in his view of it, but like things dug up out of an ancient mine by others who have explored it before us, and now by us first seen appear new. The case in *Munford*, relates only to a descent from the father, and turns upon the words of the *Virginia statute*, which does not use the terms of the common law, "on the part of the father." The case in 3 *Har. and John*. 287, is like the present, except that a partition there is conceded, still *Jane*, would be in by descent from her father, 1 *Thos. Co.* 726, 727, note (t.)

The case of *Hilliard vs. Moor*, 2, *N. C. Law Rep.* 590, referred to in 2 *Peters*, *S. C.* 58, is precisely that of the cause under consideration, and a decisive authority with the defendant. The meaning of the words on the part of the father is illustrated by *Shippen vs. Izard*, 1 *Serg. and Raw.* 225. *Bevan vs. Taylor et al*, 7 *Serg. and Raw.* 397.

This is a paternal fee and on the part of the father. The same rule applies in estates of gavel kind. I conclude, that the common law meaning of the words on the part of the father, is that none can take, but of his whole blood, and determining who is the heir that principle is the corner stone. A descent from brother to brother of a descended estate, is a mediate descent on the part of the father. So from uncle to nephew. So from cousin to cousin. So in all cases, when the heirship is traced through the blood of the father of a deceased tenant without children. These are cases of constructive descent. The case in 4 *Har. and John*. 245, relates to estates by purchase, and conforms to the common law and its fictions, but here no fiction is necessary. The legislature relied upon the correct judgment of this court in 3 *Har. and John*. 287, and in the act of 1820, did not provide for such a case, but the difficulties flowing from the decision in 4 *Har. and John*. 245, as provided for in that act.

The remaining branch of the cause involves the *seizin* of *Captain John Stewart*. The prayer to the county court, assumes he was not seized. The jury might have presumed an entry. *Evans*, in possession, was an overseer for *Alexander*, at his death; he inhabited the mansion house, and claimed the property on the part of the co-heirs. *John's* right accrued more than twenty years before this action commenced. He lived more than seven years after his right accrued, and *Evans*, the overseer, set up no exclusive right to the property, and yet the prayer assumes the fact, of no evidence of *seizin* fit to be submitted to the consideration of the jury.

I maintain, that this record shows a *seizin in fact*, by *Captain John Stewart*. If so, he was within the act of descents, and having left children, the nature of his title is immaterial; *Evans*, was a tenant in common, and his entry is that of all, in law. If lawful, it gives *seizin* to all co-tenants, and to all parceners unless to their disadvantage, as where the entry is illegal, 1 *Tho. Co.* 681, *No. C.*

I am not now contending, that *John* was seized of that part of the estate, which it is conceded descended to him under the act of 1786; yet the entry of *Evans*, for all the parceners is necessarily an entry for *John's* statutory interest. The doctrine of *possessio patris*, applies, 2 *Tho. Co.* 180, *No. W.* *Hornblow vs. Read and Pidduck*, 1 *East.* 569. Without an ouster found by the jury, the possession of one tenant in common is the possession of all. *Seizin in fact*, as well as ouster are matters of fact, and *prima facie*, the possession of one is the possession of all; and so in all cases, unless the contrary is found by the jury. An ouster, is some act adverse to the possession of another excluding him, sometimes it is presumed. *Gill and wife vs. Pearson*, 6 *East.* 181, 182. When an entry is unlawful, these doctrines are not applied. 1 *Hob.* 120. 4 *Kent.* 365, 6, 382. 2 *Cru. Tit.* 20, sec. 14, 15. 3 *Cru. Tit.* 29, sec. 60, 61. 3 *Serg. and Raw.* 385, 386. *Evans*, was a co-heir. He went into possession for all the co-heirs. *John's* interest of one-twentieth of

this estate, which descended under the statute he was in of, by *Evans'* entry. *Evans'* denial of the extent of *John's* right, is not material; for once in, the law remits him to his lawful right. So that whatever right *John* had, he was seized of in fact by the entry of *Evans*, and this makes *John* a *stirps*. Possession of part of a tract with title to the whole tract, gives possession according to title; without title, the possession is restrained to the *pedis possessio*. *Lloyd vs. Gordon et ux*, 2 *Har. and McHenry*, 260. *Ridgely's lessee vs. Ogle et al*, 4 *Ib.* 129. *Hammond vs. Ridgely*, 5 *Har. and John*. 245. *Ib. McHenry's Eject.* 178. *Barr vs. Gratz*, 4 *Wheat.* 223. This principle more strongly applies to the cause under argument. It was always the law, that a party cannot be dis-seized of an undivided interest, nor abated, nor intruded upon, while he has possession. He cannot be in of part, and not of the residue, of an undivided interest. *Reading vs. Rawsterne*, 2 *Ld. Ray.* 29. *Ib. Hob.* 122, 322. The principles relied upon and their doctrines are illustrated by various cases and decisions. 3 *Tho. Co.* 180. *Litt. sec.* 695. 2 *Tho. Co.* 465, *No. Z.* 1 *Tho. Co.* 767. *Litt. sec.* 306. 2 *Tho. Co.* 350. 2 *Tho. Co.* 299. *Litt. sec.* 701. *Ricard vs. Williams*, 7 *Wheat.* 106. 3 *Co.* 53. *Litt. sec.* 399. *Tho. Co.* 48, *No. Y.* 2 *Tho. Co.* 180, *No. U.* 1 *Cru. Tit.* 1, *sec.* 32. *Carroll vs. Norwood*, 5 *Har. and John.* 174. 1 *East.* 575. 2 *Cox's Cases*, 383. *Smith and another vs. Stewart*, 6 *John. Rep.* 37. *McHenry on Eject.* 167. 3 *Tho. Co.* 16, *No. 1.* 3 *Tho. Co.* 79, 88. *Plow.* 142. *Johnson vs. Howard*, 1 *Har. and McHenry*, 289. I conclude, that *Captain John Stewart*, at the death of *Alexander*, was seized in fact by the entry of *Evans*, and that the extent of *John's* undivided interest is not material, that whatever it lawfully was, he was in of it by operation of law, and so had a *seizin in fact*, to make him an ancestor from whom the land would descend at his death. This result sanctions the judgment of the county court.

W. W. HANDY, also for the appellee, further contended.

That the prayer in the cause was properly refused, as it put matter of law to the jury, and was defective under the act of 1825, ch. 117. It called upon the court to say, that the lessor of the plaintiff was heir at common law to *Alexander*. The court refused, and none can tell from the phraseology of the prayer, the grounds of that refusal. Whether it was that the court denied the assumption of the prayer that *Captain John Stewart*, was never seized; or that he was a tenant in common; or that the jury might presume an entry; or that he was not heir at common law; or that he had the entirety; or that it put matter of law to the jury; or that upon the death of *Alexander*, the inheritance did not devolve on *Captain John Stewart*. These may, or may not have occupied the attention of the county court.

A deed from the commissioners was not necessary to complete the title under the commission. Under the act of 1786, ch. 45, which authorized a division of the estate, no deed was made essential; nor was any provision made for a deed until 1799. It was adopted not as completing the title, but as evidence of title. Purchasers between 1786 and 1799, under such proceedings took the legal estate. Electing heirs need not take a deed, nor purchasers from sheriffs. *Stevens vs. Richardson*, 6 Har. and John. 157. *Boring vs. Lemmon*, 5 Har. and John. 225. 1820, ch. 191. 1802, ch. 94, sec. 5.

The *seizin* of *Captain John Stewart*, was established in this cause, of part under the act to direct descents, and part it is said at common law. The overseer of *Alexander*, who was in possession at his death, was a mere tenant at will, which is sufficient evidence of a *seizin* to go to the jury. There was no actual ouster in the cause, and *Evans'* lawful entry enured to the benefit of all. *Fisher et al, vs. Prosser, Cowper*, 217. Ouster is a question of fact for the jury, 2 Tho. Co. 180; when it is an inference from other facts, it is exclusively for the jury.

The cause has been before decided. The case in 3 Har. and John. 287, is decisive of the question. It related to the same lands, the same descent, and it depended on the same

facts; and it was then held to be an estate descending on the part of the father. Now this court is called on to say, that in 4 *Har. and John*. 245, they overruled the case in 3 *Har. and John*. Upon that assumption this ejectment was instituted. The case in 3 *Har. and John*. was fully discussed by able counsel, and the actual question could not be avoided. The record disclosed but a single point, which is decisive of the point now debated. If this is not so, the rule of *caveat emptor*, would teach us to beware of our judicial officers, and courts could no longer take refuge under the salutary maxim *stare decisis*. The defendant, my client, bought under the authority of the decision announced in 3 *Har. and John*. He is an innocent purchaser, and I have no fear, that vague notions of alleged conflicting rules of decision, will uproot the possessions of the innocent. Some deny the right of reversing opinions, in the abstract. Nothing but great necessity can reduce a court to reverse its own solemn judgment; and cotemporaneous constructions of statutes are respected, though doubted. A judicial decision cannot have less weight, for to this, all persons must refer as a rule of conduct. 7 *Peter's S. C.* 543. *Hammond vs. Ridgely*, 5 *Har. and John*. 245.

There was evidence to prove a partition, which in principle deprives the court of the power of assuming there was no partition according to the hypothesis of the plaintiff's prayer, *Davis vs. Leab*, 2 *Gill and John*. 302. *Gale vs. Lankford*, *E. S. June*, 1833.

By the act of 1798, ch. 101. sub. ch. 1, it is declared, "that all lands, tenements and hereditaments, which might pass by deed, or which would in case of the proprietors dying intestate descend to his heirs and except estates tail, shall be subject to be disposed of by last will and testament, &c."

This act differs from the *English* statute of wills; the word *having*, in that statute relates to *seizin*, legal or equitable, and the estate here claimed is affected by the residuary clause of *Captain John Stewart's* will, made in 1816. He had such a *seizin*, as would enable him to make a good deed of bargain and sale, and consequently his estate no matter how

acquired, passed under his will. Upon the question whether actual possession in the grantor is necessary to constitute a valid, deed of bargain and sale from him. He cited, *Mason's lessee vs. Smallwood*, 4 Har. and McHenry, 484. *McKeel's lessee vs. Woolford*, Ib. 495. *Lewis' lessee vs. Beall*, Ib. 488. *Ridgely, et al, lessee, vs. Britton*, Ib. 507. *Goodwin vs. Hubbard, et al*, 15 Mass. 214. *McHenry on Eject*.

NELSON, for the appellant, in reply :

After adverting to the facts, he insisted that the cause was properly before the court, and within the act of 1825. The prayer does not attempt to dispose of the whole cause as in *Davis vs. Leab*, but only calls upon the court to instruct the jury upon the law of heirship applied to these parties, on the principles of the common law. No other question is decided, and the prayer asks for two specific directions, both of which appear: these only can be reviewed.

The proceedings in *Somerset* county court were void. The ratification of the sale did not pass title without a deed. No matter what equitable estate passed, the legal did not. These proceedings are specially regulated by law, and whether the title claimed is by election or purchase, the prescribed course must be pursued. Now although under the act of 1786, no deed is directed, yet the act of 1799, makes it the duty of the commissioners to execute a deed of conveyance, to evidence the title of the purchaser. The obligation to convey, is now doubted for the first time. The general impression is otherwise, and we find a crowd of laws passed to supply defects in such deeds, and omissions arising from the death of commissioners. The deed is decided to be necessary by two or three classes of cases :

1st class.—Proceeds of sales of an estate sought to be reached by husband. These cases only decide, that the character of the proceeds are changed upon sale and ratification, but this does not affect the legal title. The change is effected by judicial power. They merely relate to the conversion, and not the legal title.

2d class.—Are cases of election, under act of 1785. Two of them, one from *Somerset*, one from *Harford*. The last was upon an election to take the estate, but the party had not executed the bonds, nor paid the purchase money; decided that the title did not pass until all the requirements of the law were fulfilled, and this was at a time, when the commissioners were not bound to give a deed. In the *Somerset* cause, the title in the party electing was complete upon election. All the acts to be done by him, had been done, and the law did not require a deed. *Stevens vs. Richardson*, 6 *Har. and John*. 156. This case affirms my view, that no deeds were necessary in cases of election.

3d class.—As to purchasers the law is different under the act of 1785, the same question decided *Massey vs. Massey's lessee*, 4 *Har. and Johns*. 141. This conforms to all the laws respecting the enrolment of deeds, and the general policy of the law, and applies to most cases where titles are to pass.

In purely judicial sales at common law, deeds are not necessary. These proceedings never divested the title of *Captain John Stewart*, and the descent was never intercepted in its passage to the lessor of the plaintiff. I admit that if *John* was ever seized of this property, it would descend to his children, or pass under his will. This action is not brought to recover the entire estate of *Alexander*, but a moiety of it, which it is contended, descended according to the principles of the common law, and the true inquiry is, whether *Captain John* was ever so seized of that moiety, as to bar his eldest son. In *Maryland*, there must be a concurrence of a right to, and actual seizin of the estate to do that. Actual seizin is not pretended. Constructive possession is relied on. This is a clear case of ouster by abatement. One-half of the estate descended under the act of 1786, and in this the lessor of the plaintiff had one-twentieth; of the other one-half, he was owner of all. In regard to one, they were parceners by descent; as to the other, if our theory be true, they had no interest—as to this, not tenants in com-

mon—no unity of title; there was only unity of possession. How are they seized? *per my* in *severalty*, and only so seized; not *per tout*, as parceners or joint tenants. Has there been an ouster of this moiety? I consider a seizin of an interest in the estate, in him, but not the whole of the undivided moiety. The authorities relied on, all rest on principles in conflict with the facts in this cause. Where one tenant goes into possession of an estate in common, his entry shall enure to all. What is the reason of this rule? The law does not presume a wrong; it subordinates his possession to his title; makes him steward for the others. Such is the extent of the doctrine, and all the books refer to *Coke*: therefore in regard to the one-twentieth which descended under the statute, the possession of *Evans*, was the possession of all the collateral relations claiming the estate. The principle that a party cannot be disseized of an undivided moiety, has reference to one in actual possession, and arises only upon a conflict for possession. It cannot apply to *Captain John Stewart*, as he never was seized. The use made of this doctrine is, to pervert the adverse entry, and claim of *Evans*, into an admission of *John Stewart's* title. *Evans'* conduct is a clear ouster. He says the title is not yours; one-twentieth was not in controversy, but as to all the rest, *Evans* entered, and remained in, under an adverse title. Abatement is one of the means of bringing about an ouster; it is the entry of one, not having title. *Evans* was in by wrong—by deforcement, and the only remedy is ejectment. The conduct of *Evans*, showed the character of his entry. If adverse, it cannot enure to his co-tenant. *Davenport vs. Tyrrel*, 1 *Wm. Black.* 675. The intent prevails against the legal presumption; the acts, conduct, and declaration of the party entering, give rise to a different rule. These principles show it cannot be a case of constructive seizin.

It is said the fact of seizin was taken from the jury, by the assumption of the rejected prayers. It was not their province to decide upon it. What facts constitute seizin is a

Stewart's lessee vs. Jones.—1836.

question of law—whether they exist, is for the jury. But here, the facts are admitted; when there is no fact in dispute the seizin is for the court, and I answer a similar objection upon the subject of partition in the same way.

The power to will this estate, is put upon the ground of a power to convey it, and to make such a devise, the estate must have a capacity to descend; this, therefore depends upon the same question of actual seizin.

The only remaining question is, upon the act of 1786. The two decisions on that act, cannot be reconciled in principle. They differ in circumstances, but conflict in principle. I have no disposition to disturb settled rules of decision, nor do I deny, that vacillation of opinion, is not attended by serious consequences, but error should be corrected as occasion demands; an adherence to error, would be monstrous. It is an open question, within the power of the court, and they may correct either of the decisions, of *third* and *fourth Har. and Johns.* if either be incorrect, or harmonize, if they be harmonious.

The principle of *Hall and Jacobs* is, that having derived the estate *collaterally*, it was not within the act of 1786. It decides that no case of a descent from brother to brother is within the act; that taking an estate from the brother, it did not descend on the part of the father; not a lineal, but an immediate descent, and therefore, not a paternal estate, which is just the case at bar. *Jane Stewart*, had no common law estate. It would not have descended to her heirs at common law, except under particular customs. Then from whom does *Alexander* inherit? From his sister, which is not provided for by the act of 1786. By the act of 1820, this case is provided for, which shows that the legislature understood the first decision in *3 Har. and John.* to have been overruled.

STEPHEN, Judge, delivered the opinion of the court.

This action of Ejectment was instituted in the court below to recover two tracts or parcels of land called "*Dashiell's*

Lot" and "*Stevens' Folly*." The declaration contained two counts, one for the entirety, the other for undivided moieties. The lessor of the plaintiff claims to recover as heir at common law, of a certain *Alexander Stewart*, who departed this life sometime in the year 1810. The land in controversy descended to *Alexander*, from his sister, *Jane Stewart*, who died seized thereof in the year 1797, intestate, and without issue, leaving the said *Alexander*, her brother, and only heir at law. The title of *Jane*, was derived by descent from her father, *Col. John Stewart*, who departed this life sometime in the year 1794, her brother, *Alexander*, being her brother of the whole blood, and who was also a son and heir of the said *Col. John Stewart*. The said *Jane* and *Alexander*, being the only children and heirs at law, of the said *Col. John Stewart*. The defendant claims title under the commission issued from *Somerset* county court, on the petition of one of the collateral heirs of the said *Alexander*, claiming title to a part of said lands under the act of descents of this *State*; the said *Alexander*, having died as aforesaid, intestate and without issue. The lessor of the plaintiff claims his title as heir at common law, of the said *Alexander Stewart*, as the oldest son of the said *John Stewart*, who was the oldest son of *William Stewart*, who was the only brother of the said *Col. John Stewart*. The question therefore to be decided by this court, is, whether on the death of *Alexander*, intestate and without issue, the lands in controversy descended from him to his collateral heirs under the operation of the act of descents of this *State*, or to the lessor of the plaintiff as his heir at common law. *Capt. John Stewart*, the father of the lessor of the plaintiff, departed this life sometime after the death of the said *Alexander Stewart*, without ever having been actually seized as is alleged of the lands, to recover which this action of ejectment was instituted. The solution of the question arising in this case depends upon the nature of the title under which *Alexander Stewart*, held the property in controversy at the time of his death. On the part of the lessor of the plaintiff it is contended, that he took it by immediate descent from

his sister, as her heir at common law, and that therefore the lessor of the plaintiff is entitled to recover as his heir, according to the rules and canons of descent as fixed and established by that law; on the part of the defendant it is contended, that although he took it by immediate descent from his sister, yet as it descended to her from their common father, it was a descent to him on the part of the father, and is therefore operated upon by the express provisions of the act of descents of this *State*. According to the principles of the common law of *England*, as well as the act of descents of this *State*, descents are either lineal or collateral, and both may be either mediate or immediate. The immediate lineal descent at common law, is from the father to his son, the immediate collateral descent is from one brother to another. The mediate, when one derives his inheritable blood to another by the medium of a third person; as in lineal descent, if a son claims as heir to his grandfather, or great grandfather, it shall be *mediante patre*, though the father be dead at the time of the descent; so in a collateral descent from a nephew to an uncle, or from an uncle to a nephew, it shall be made *mediante patre*, 3 *Comyn's Digest*, 408, 409. In 2 *Black. Com.* 223, it is said "it must be observed, that the lineal ancestors though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring; and therefore, in the *Jewish* law, which in this respect entirely corresponds with ours, the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue, who are held to succeed not in their own rights as brethren, uncles, &c. but in right of representation, as the offspring of the father, grandfather, &c. of the deceased. But though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to name him, in making out the pedigree or descent. For the descent between two brothers, is held to be an immediate descent; and therefore, title may be made by one brother, or

his representative to or through another, without mentioning their common father. If *Geoffrey Stiles*, hath two sons, *John* and *Francis*, *Francis*, may claim as heir to *John*, without naming their father *Geoffrey*; and so the son of *Francis*, may claim as cousin and heir to *Matthew*, the son of *John*, without naming the grandfather; to wit: as son of *Francis*, who was the brother of *John*, who was the father of *Matthew*. But though the common ancestors are not named, in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of *John Stiles*, it is first necessary to recur to his ancestors in the first degree, and if they have left any other issue besides *John*, that issue will be his heir. On default of such, we must ascend one step higher to the ancestors in the second degree, and then to those in the third and fourth, and so upwards *in infinitum*; till some couple of ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of *John Stiles*, must derive his descent." Though therefore, according to the principles of the *English* law of descent, the descent from brother to brother is held to be immediate, and title may be made by one brother to another without mentioning their common father, yet the law still respects the father as the fountain of inheritable blood. From these principles it seems to follow, that though the descent from brother to brother is held to be an immediate descent, yet the title of the brother as heir, must be founded upon a descent from the same pair of common ancestors, as the fountain of inheritable blood. Although therefore, the descent from brother to brother is immediate, yet as the brother derives his inheritable blood by descent from their common father and mother, the descent is also mediately from them; because we have seen, that according to the doctrine as laid down by *Comyn*, in his digest, a mediate descent is "where one derives his inheritable blood to another by the medium of a third." Here we think we might safely stop, and from the proceeding principles of the

common law, legitimately draw the conclusion, that the descent from *Jane*, to her brother *Alexander*, though an immediate descent according to the principles of that law was still mediately from the father from whom *Alexander* derived his inheritable blood, and was therefore on the part of the father, and consequently embraced within one of the classes of the law of descents of this *State*. But there are other considerations which we think have a considerable bearing upon this case, to which it is proper we should advert. In the year 1786, the legislature of this *State*, impressed with a conviction that the rules and canons of descent as established in *England*, and which originated from the feudal system, were contrary to justice, and ought to be abolished; framed a new scheme or system of descents, in many of its features essentially variant from that adopted and prevailing in *England*; by that law, new capacities of inheriting was created, unknown to the common law of *England*. It provided that on the death of the intestate, and on the failure of lineal heirs in the descending line, if the estate descended to the intestate on the part of the father, the estate should descend to the brothers and sisters of the intestate of the blood of the father, without discriminating between those of the whole or the half blood; so that *Alexander*, though only of the half blood to his sister, *Jane*, would have taken as her heir, equally as if he had been of the whole blood under the operation of the law of descents of this *State*; and in such case, as he would have been excluded according to the principles of the common law, it is manifest he could only have taken on the ground of deriving his inheritable blood to his sister, from or through the father, and consequently by the medium of the father. The descent therefore to him, though immediately from the sister, was mediately from the father, and consequently must be deemed a descent on the part of the father. Under a similar aspect this question has been viewed by the *Supreme Court of the United States*, in a case reported in 2 *Peter's S. C. Rep.* 58. In that case as here, the property in dispute descended from the

mother to her three children, who were two sons and a daughter; the two sons died intestate, and without issue, and on their deaths, their shares of the estate descended to their surviving sister. The sister then died intestate, and without issue, and in order to decide the rights of the parties litigant in the action of ejectment there pending, it became necessary to decide the character of the descent, by which the sister held the two-thirds which passed to her by descent from her brother, and if it was to be considered as a descent from the mother, under the law of descents of the *State of Rhode Island*, where the suit was brought, the lessors of the plaintiff had no title, if not, they were entitled to recover. Judgment was given for the plaintiff, and *Mr. Justice Story*, in delivering the opinion of the court, uses the following expressions: "The estate originally came from *John Collins*, by devise to his daughter, *Mary Collins*, and by descent from her to her three children, and mediately as to the two-thirds, to the intestate through her brothers." The descent to the surviving daughter from her mother, he of course held to be immediate; but as to the two-thirds, which passed to her from her brothers, whom she survived; he held the descent from the mother to be a mediate descent, and not immediate, and being a mediate descent from the mother, though not an immediate one, it was still a descent on the part of the mother. It is to be observed, that the question arising in this case, does not now for the first time come before this court for its decision. More than twenty years ago, the very point now in controversy was presented to this court for adjudication; the case in which it arose may be found reported in 3 *Har. and Johns*. 287, and we are happy to find, that under all the lights we have since received, we discover no cause to dissent from the opinion there given, and that the rule of property then established, may consistently with principle be still held sacred and inviolable. It is much to be regretted, that in deciding the above case, the court gave no reasons for the judgment which was rendered; but we have the argument of the counsel for the appellee, who was

the successful party; by whom it was contended, that the rules and principles of the common law had nothing to do with the case, but that it depended on the true construction of the act to direct descents, meaning the act of 1786, ch. 45. They contended, that the land descended immediately from the sister, and mediately from the father, and that although the descent was not from or through, yet it was on the part of the father. Whether this argument of the appellee's counsel was adopted by the court to its full extent, the report of the case does not inform us; but it is clear from the result, that the decision was founded upon the principle, that the descent from the brother, who last died seized, was not governed by the doctrines and principles of the common law, but was controlled and operated upon by the act of descents of this State. It has been contended in the argument of this case, that the decision of the court in that case, is in conflict with the decision since made by this court in the case of *Hall vs. Jacobs*, reported in 4 *Har. and John*. 245. But we cannot accede to this proposition; and we think that the two cases so far from being identical, are essentially dissimilar in a most prominent feature. In the case last mentioned, *Joseph and Rachael Jacobs*, from whom the property descended to their brother, *Dorsey Jacobs*, the intestate, acquired it by purchase as devisees under the will of their father *Richard Jacobs*; it was not therefore as here, a case of descent, but of purchase; and upon that ground the opinion of the court seems to have been founded; for we find, that the present chief judge, by whom the opinion of the court was delivered, after deciding that the estate which was vested in *Dorsey Jacobs*, by purchase, under the will of his father was embraced by the act of descents, and on his death descended to his brothers and sisters of the half blood, uses the following language, "with respect to the two-thirds of the land, which were vested in *Joseph and Rachael Jacobs*, by purchase, under the will of their father, *Richard Jacobs*, there appears to be more difficulty," and after adopting a course of reasoning to shew that they did not vest in *Dorsey Jacobs*, by purchase,

and consequently did not descend to his brothers and sisters of the half blood, he comes to the conclusion, that it was not an estate which descended to him either on the part of the father, or on the part of the mother, and was not therefore within either of those two classes of cases, and could not consequently descend to the lessors of the plaintiff equally.” and he ultimately came to the conclusion, that the land in question passed by immediate descent to *Dorsey Jacobs*, from his brother and sister, *Joseph and Rachael*, who acquired it by purchase, and on his death intestate and without issue, leaving no brother or sister of the whole blood, it descended at common law to his uncle, *John Jacobs*, the brother of his father of the whole blood, to the exclusion of his two aunts, *Elizabeth Walker* and *Hannah Fowler*. In another part of the opinion he says, “by the common law, if a man purchases land, he is by fiction understood to hold it *ut feudum antiquum*, not as land descended either *ex parte paterna*, or *ex parte materna*, for the law will not ascertain it, but as an estate derived to him from some unknown ancestor, and if he dies intestate and without issue, it will go first to the heirs on the part of the father, and on failure of such heirs, then to the heirs on the part of the mother, the males being always preferred to the females, and amongst males, the right of primogeniture prevailing.” And he finally decides, that the land in controversy having passed by immediate descent to *Dorsey Jacobs*, from his brother and sister, *Joseph and Rachael*, who acquired it *by purchase*, on his death intestate and without issue, leaving no brother or sister of the whole blood, it descended to his uncle, *John Jacobs*, as his heir at common law. From the preceding view of this case we think it clear, that the opinion of the court in *Hall vs. Jacobs*, was essentially placed upon the fact, that *Joseph and Rachael Jacobs*, from whom the estate descended to *Dorsey*, having acquired it by purchase, and not by descent from their father, it could not be considered as descending to him mediately from the father, and consequently was not embraced by the act of descents of this *State*, as property descending on the

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part of the father ; we therefore think, that the two decisions of this court, reported in the third and fourth of *Har. and John*. so far from being in conflict, are in perfect harmony with each other, and that there is no discrepancy between them.

JUDGMENT AFFIRMED.

JOHN ANDERSON vs. NEGRO JULIA ANN BAILY.
June, 1836.

L, the owner of a female slave, declared by deed of manumission duly executed and recorded in 1803, that she should be free, at thirty years of age, "and in case the said negro girl, may hereafter, have a child or children before she arrives at the age of thirty, that then such child or children shall be free, at their birth." *Held*, that under the act of 1796, ch. 67, sec. 13, the children of the said female slave, at their birth, not being able to work and gain a sufficient maintenance, could not be liberated.

APPEAL from *Baltimore* city court.

The appellee petitioned for her freedom on the 1st of June, 1833, and after an appearance, and denial of her right by the appellant, the case was submitted to the court below, upon the following statement of facts :

"It is admitted that *Gideon Longfellow*, of *Kent* county, was heretofore the legal owner of a female slave named *Lucy*, and on the second day of December, 1803, executed in due form of law, the following deed of manumission, which was duly recorded in *Kent* county court.

"*Maryland*.—*Kent* county, to wit: To all whom it may concern, be it known, that I, *Gideon Longfellow*, of the county and state aforesaid, for divers good causes and considerations, me thereunto moving, do hereby release from slavery, manumit, and set free, my negro girl named *Lucy*, being of the age of eleven years or thereabouts, when she shall arrive at the age of thirty years ; and in case the said negro girl *Lucy* shall, or may hereafter have a child or children, before she arrives at the age aforesaid, that then, such child or children, shall be free at their birth.

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“I do hereby acknowledge the said negro girl *Lucy*, discharged from all claim of service and right of property, whatever from me, my heirs, executors, or administrators, from and after she arrives at the age aforesaid. In testimony, &c.”

It was further admitted, that said *Longfellow*, shortly after the execution and recording of said manumission sold, or otherwise disposed of his right in said *Lucy*, to one *Henry Taylor*, of the same county, in whose family, she remained until her arrival to the age of thirty, when she became free, and with the consent of said family removed to the *City of Baltimore*, where she has continued to reside ever since. It was further admitted, that the petitioner is the child of the said *Lucy*, named in the manumission, and was born after the execution thereof, but before her mother became entitled to her freedom, and is now nineteen years of age. That said *Lucy*, survived the said *Taylor*, and the time she had to serve was appraised in his estate. That about two years before his death said *Taylor*, gave the petitioner then a small child to his daughter, the wife of the defendant, who took her into possession, and held her until after her father's death, when the family supposing to be free under the said manumission, suffered her to depart from their service, and come to *Baltimore*, to reside, and where she has continued to reside for about ten years last past, enjoying her freedom, without any claim being made to her as a slave, until arrest by said *Anderson*, which occasioned the filing this petition.

That the said *Lucy*, during the time of her servitude with *Taylor*, had three other daughters *Eliza*, *Jane*, and *Hannah*, and that neither they, or the petitioner were appraised as part of his estate.

Upon the statement of facts, the *City court*, gave judgment for the petitioner, and from that judgment the defendant appealed to the Court of Appeals.

The case was submitted to BUCHANAN, Ch. J. and STEPHEN, ARCHER, DORSEY, and CHAMBERS, Judges, upon

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written arguments furnished by the counsel to the court, but which the reporters have not seen.

ARCHER, Judge, delivered the opinion of the court.

The case of *Hamilton and Cragg*, 6 *Har. and Johns*. 16, is decisive of this cause. This court there determined, that the provisions of the act of 1796, ch. 67, sec. 13, applied to the will then under consideration, and that the petitioner in that case was not entitled to freedom. *Rachel Turner*, made her will in 1801, containing the following clause, "I give and bequeath to my loving sister, *Sarah Turner*, five negroes by name, *Frank*, *Joe*, *Tille*, *Mill*, and *Linn*, to possess and enjoy during her natural life, them and their increase, and my will is, that after my sister's death, the above named negroes be free."

The petitioner was the son of *Mill*, and was born after the death of *Rachel Turner*, and at the death of the legatee for life, he was about two years of age. The court in delivering their opinion say, that the issue of the negroes named, one of whom was the petitioner, though unborn at the time of the will, were equally objects of the testatrix's benevolence, with the negroes themselves, and were entitled to their freedom, if they were in a predicament to receive it. They then proceed to adjudge, that he was not entitled to freedom under the act of 1796, because he was not when his freedom was to commence, *able to work, and gain a sufficient maintenance*.

It thus appears, that although the testator intended to give freedom to the issue, yet that such freedom was entirely dependant upon the "issue's" ability to gain a sufficient maintenance. So in this case the intention is express, to liberate the issue at its birth, but the intention cannot be legally perfected, for at the moment of time, when the freedom is to operate, the petitioner was incompetent to take it; that is, she was unable to gain a sufficient maintenance. It certainly can make no difference, that by the deed, the issue is to be free at its birth, at two years old, on a contingency; if when the contingency happens the issue is not able to work and

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gain a maintenance; because in each case, there is a legal incapacity for freedom.

That in the two latter cases the issue was born a slave, according to the intention of the manumittor, and that in the former at its birth, so far as intention would affectuate any thing, he was free, could not furnish the basis for a different adjudication in the two cases; because the law of 1796, applies at the moment of birth, so that the intention cannot be carried into effect against the statutory disability.

If the statement had concluded with submitting the facts of this case to the judgment of the court, we should have adjudged the petitioner to be a slave; but it submits nothing to the court, and we shall award a *procedendo*.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

ADAM AND JOHN MILLER vs. JAMES ALLISON *et al*,
June, 1836.

The act of 1825, ch. 117, does not require exceptions to be filed, to the auditor's statement, made for the purpose of exhibiting the rights of the parties, as they had been solemnly adjudicated by the Chancellor by a previous order.

The ordinary statements of the views and opinions of the auditor upon the rights of the parties, designed to give them an opportunity, more distinctly to present to the Chancellor the matters in contest, are within the act of 1825, ch. 117, and should be excepted to in the court of chancery.

The construction given to the statute *Westm. 2. 13 Edw. 1*, ch. 18, adopted by analogy, and applied to the act of 1810, ch. 160, requires that judgments at law from the time of their rendition should be liens upon equitable estates in real property, and are recognized as such in courts of law.

When a *fi. fa.* on a junior judgment is levied on an equitable interest on the lands of the debtor, and subsequently, a *fi. fa.* on a senior judgment comes to the sheriff's hands, the senior judgment must be first satisfied.

APPEAL from the court of *Chancery*.

On the 26th of August, 1833, the appellants filed their bill in the court of Chancery, against *Jeremiah L. Boyd, Charles Ridgely*, and others, alleging, that in the year, 1830, the

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defendant, *Boyd*, purchased of the defendant, *Ridgely*, certain real estate in the city of *Annapolis*, and paid for the same, but without obtaining the legal title. That in 1831, the complainants obtained a judgment in *Anne Arundel* county court, against *Boyd*, upon which in 1832, they caused an attachment to issue, and to be laid upon the same property, and that a judgment of condemnation was rendered at the April term, 1833. That a *feri facias*, was subsequently issued, which by reason of the fraud, &c. of *Boyd*, and others, could not be made available, in consequence whereof, they pray the interposition of the court, and that a deed may pass for its sale.

The Chancellor accordingly on the 23d of July, 1834, decreed a sale of the property, "for the satisfaction of the claim of the complainants, and of all others who are the creditors of the said *Boyd*, at the time of the institution of this suit, according to their respective priorities, and due proportions." The property was sold, the proceeds brought into court, and by order of the Chancellor, passed on the 4th of March, 1835, directed to be applied, "in satisfaction of the several judgments against the said *Boyd*, according to their priorities as shown by the date of each respectively."

An account was stated in conformity with this order, on the 19th of March, 1835, which the Chancellor, on the 12th of May, 1835, ratified and confirmed.

The complainants appealed from these orders, by which a preference was given to judgments in favour of *Allison*, and another of the appellees, they being older than the complainants' judgment.

The cause was argued before BUCHANAN, Ch. J. and DORSEY, CHAMBERS, and SPENCE, Judges.

PINKNEY for the appellant contended :

1. That *Boyd's* interest in the property, being but an equitable one, the judgments of the appellees were not liens upon it. *Bogart vs. Perry*, 1 John. Ch. R. 52. *Barton et al, vs. Rushton et al*, 4 Dessau, Rep. 373. Act of 1810 ch. 160.

2. That the act of Assembly subjecting equitable estates to be sold under execution, makes executions alone liens upon such estates, &c.

3. That the appellants by their attachment, acquired a preference over the other creditors.

RANDALL and BRICE for the appellees insisted .

1. That courts of equity, in analogy to the principles which obtain at law, consider judgments liens upon equitable titles to real estate, according to their dates. *Hanson vs. Barnes' lessee*, 3 *Gill and John*. 359. *Lee and wife*, and *Jordan vs. Stone and McWilliams*, 5 *Ib.* 1.

2. But if this was not so, still the decree of the Chancellor in the present case must be affirmed, because by its very terms the proceeds of the sale, are to be distributed among the creditors according to their priorities, and of course, all who come in under it, are estopped from resisting its execution.

DORSEY, Judge, delivered the opinion of the court.

A preliminary question in this case presents itself for our determination. Are we at liberty to consider the exception now taken to the auditor's account of the 19th of March, 1835, no exceptions to that account having been filed in the court of Chancery? The 2d section of the act of 1825, ch. 117, prohibits in appeals from courts of equity, the reversal of any decree, upon any exception to any account, unless it shall appear by the record, that such exception was taken or made in the court from whose decree such appeal shall be made. It is true, exceptions were taken below to the account stated by the auditor on the 14th of February, 1835. But those exceptions were premature; that account made no disposition, or appropriation of the fund in controversy; and therefore furnished no ground for the exceptions to it taken by the parties. The auditor's account of the 19th of March, we do not regard as one to which exceptions were required to be taken by the act of 1825. It was not the ordinary

statement, of the views and opinions of the auditor, upon the rights of the parties, but it was the mere formal ministerial act of that officer, exhibiting a statement of the rights of the parties, as they had been solemnly adjudicated by the Chancellor, in his order of the 4th of March, 1835. It was no part of the design of that statement, to give the parties litigant an opportunity more distinctly to present to the view of the Chancellor, the matters in contest between them. All controversy had been terminated by the previous decision of the Chancellor; so far from its being the duty of the solicitors to have filed exceptions to such an audit, to have done so we think would have been uncourteous and disrespectful to the Chancellor.

The act of 1825, presenting no obstacle to the revision of the orders of the Chancellor, which have been appealed from, are the grounds assigned for their reversal sustained? is the next inquiry. It is insisted, that a judgment at law is no lien on an equitable estate in land, and consequently, that the lien acquired by the appellants, through the proceedings under their judgment, entitle them to the payment of their entire claim, to the exclusion of all other creditors. If the first part of this proposition were true, the subsequence would undeniably follow. But the first part of it is not true, and of consequence the second cannot be sustained. In *Lee and wife, and Jordan vs. Stone and McWilliams*, 5 Gill and John. 1, this court determined, that in equity, a judgment was a lien upon the equitable real estate of the debtor, and this decision was made without reference to the act of Assembly of 1810, ch. 160. By that act, equitable estates in lands were subjected to sale under writs of *fieri facias*. Adopting by analogy the construction given to the statute of *Westm. 2*, 13, *Ewd. 1*, ch. 18, since the passage of the act of 1810, judgments are legal liens, upon equitable real estates, from the time of their rendition, and will be recognized as such in courts of law. Should therefore, a *fieri facias* on a junior judgment, be levied upon an equitable interest in the lands of the debtor, and subsequently, a *fieri facias* on a senior

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judgment comes to the sheriff's hands, the senior judgment must first be satisfied.

The decree of the Chancery court is affirmed with costs.

BUCHANAN, Ch. J. "I dissent from the proposition advanced in this case, that a judgment at law is a lien at law, upon a mere equitable interest."

DECREE AFFIRMED.

EVANS AND IGLEHART vs. JOSEPH E. MERRIKEN.
June, 1836.

By the deed of mortgage, the legal estate becomes vested in the mortgagee, defeasible at law upon the performance of the condition and payment of the money at the time stipulated; but upon default of the mortgagor in the non-payment of the money at that time, it becomes indefeasible at law, and defeasible only in equity, where the mortgage is considered only as a security for the debt and the mortgagor notwithstanding his default will be permitted to redeem.

The issue of a mortgaged slave, born after the title of the mortgagee has become absolute at law, and during the possession of the mortgagor, is liable for the payment of the mortgage debt; and such issue may be sold upon a bill filed to enforce payment, although no specific notice of the issue is taken in the bill.

The assignee of the mortgagor of personal property, cannot plead limitations to the bill of the mortgagee claiming a sale of the mortgaged property for the payment of his debt, when the mortgagee had no knowledge of his adversary claim for a sufficient time to make the bar available.

APPEAL from the court of *Chancery*.

The appellants on the 15th of April, 1834, filed their bill in the court of Chancery, for the foreclosure and sale of certain personal property, which had been mortgaged to them by *William D. Merriken*, the father of the appellee and others, who were made defendants.

In the mortgage (which bore date 18th April, 1823,) were mentioned several female negro slaves, who with other property, were conveyed to the appellants to secure the payment of \$794, due from the mortgagor to them, and there

was the usual clause of redemption, in case the mortgage debt with interest, should be paid on the 18th of April, 1824, Nothing was said in the instrument about the issue of the female slaves, nor was any reference made to such issue in the complainants' bill.

A decree passed for the sale of the property on the 4th of August, 1834, and in the trustee's report it was stated, that in addition to the original slaves, they had sold two negroes, the issue of the females, who were born after the forfeiture of the mortgage, but whilst the parents were in possession of the mortgagor.

Objections were filed by the appellee and others, the representatives of the mortgagor, to the ratification of the sale, so far as related to the before mentioned issue, but the proceedings show, that the controversy was finally narrowed down to one of the issue, who was claimed by the appellee, upon the following grounds.

1. That the said negro was not included in the mortgage, and was not legally transferred to the mortgagees by the terms thereof, there being no mention of the increase.

2. That the bill does not pray for a sale of the increase, and therefore, it could not be sold, though the legal operation of the mortgage should transfer such increase.

3. That the negro so sold was not the property of the mortgagor, and liable to the claim of the complainants, he having been for a valuable consideration, sold and delivered by the mortgagor to the appellee, and having remained in his possession from the time of the sale and delivery, until sold by the trustees, with the knowledge of the complainants, and without any claim of the title to him, on their parts.

4. That, but for the negligence of the complainants, and the indulgence shown by them to the mortgagor, their debt might have been fully secured without having recourse to the property claimed by the appellee, and

5. Upon the ground of limitations.

The appellee in support of his claim, to the negro in question, filed a bill of sale executed to him by the mortgagor on

the 23d of January, 1826, by which for the consideration of \$20, the title of the mortgagor to said negro was conveyed to him. This bill of sale, was acknowledged before a justice of the peace on the day of its date, but did not appear to have been recorded.

After proof had been taken by the parties, under an order for that purpose, the Chancellor (*Bland*) on the 23d of March, 1835, referred the case to the auditor, with directions to state an account, awarding the whole of the proceeds of the sale of the negro in controversy, to the appellee. The account in other respects to be stated according to the nature of the proof.

The auditor having stated an account in conformity with this order, appropriating to the appellee, the proceeds of the sale of the said negro, and applying the proceeds of the other property to the complainants' claim, leaving a considerable balance unpaid, the complainants excepted on that ground to the account. But the Chancellor, on the 4th of April, 1835, overruled their exception, and ratified and confirmed the account, and the complainants thereupon, brought the record by appeal before this court.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, DORSEY, CHAMBERS, and SPENCE, Judges

HAMMOND AND PINKNEY, for the appellants, contended :

1. That the issue of a female negro slave, born after forfeiture, is liable to be sold to satisfy the mortgage debt, the title of the mortgagee in the mortgaged premises, in such circumstances, being complete. 1 *Powel on Mortg.* 172. *Ib.* 171, (1) *Maston vs. Hobbs*, 2 *Mass. Rep.* 435 *Conard vs. Atlantic Ins. Co.* 1 *Peters' Rep.* 441. *Jameson vs. Bruce*, 6 *Gill. and John.* 72. *Brown vs. Bement and Strong*, 8 *John. Rep.* 96. *Holmes et al, vs. Crane*, 2 *Pick.* 610. *Jones vs. Smith*, 2 *Ves. Jr.* 378. His right to the possession and property being consummate, the rents, issues and profits, follow as a necessary incident, both at law and in equity.

1 *Cov. Powel*, 172, 175, 162, *note (h.)* 157, (b.) 2 *Jacob and Walk.* 235. If the mortgagee had been in possession of the mortgaged property, at the time of the birth of the increase, there can be no more doubt, in relation to the mortgagor's right to redeem it, than of his right to redeem the parent stock, which must proceed upon the ground, that such stock and the increase are in the same situation; both alike, regarded in the light of a security for the debt. *Field vs. Beeler*, 3 *Bibb.* 18. Suppose, instead of personal chattels, the mortgage had been of land, and during the possession of the mortgagor, there had been an augmentation by alluvion, would not the land so formed, have constituted, together with the original soil, a security to the mortgagee? There can be no doubt of it, and the reason in favour of such extension of the security, applies with equal, if not greater force, in the case of personal property, because the right to the latter, carries with it the possession.

No principle is better established, than that the owner of the mother is entitled to the offspring. 2 *Black Com.* 404. And this, though such owner is merely the life tenant, because the offspring is regarded as a profit accruing during his title. 1 *Har. and Johns.* 526. 7 *Ib.* 257. That any increase to the subject mortgaged, is considered parcel of the security, is indisputably settled. *Field vs. Beeler*, 3 *Bibb.* 18. *Hughes vs. Graves*, 1 *Litt. Rep.* 317. *Crews vs. Pendleton*, &c. 1 *Leigh. Rep.* 297. *Moor's Ex'r vs. Ajlete's Ex'r*, 1 *Hen. and Munf.* 29.

The increase of a pledge, is itself pledged. *Story on Bail*, 200. And the right of the mortgagee, is superior to that of the pledge. *Haven vs. Low*, 2 *New Hump.* 13.

2. The defence resulting from limitations will not avail the appellee. In the first place, he has not presented it in such a form, as would entitle him to the benefit of the statute, even if under the circumstances, it would constitute an effectual defence. Such however, is not the case. The possession of the mortgagor, and those deriving title from him, is the possession of the mortgagee. *Angel on Limitations*, 105,

113. *Higginson vs. Mein*, 4 *Cranch*, 415. It is not regarded as adverse, having commenced originally with the permission of the mortgagee. *Gwynn vs. Jones' lessee*, 2 *Gill and John*. 173. *Parkins vs. Parker*, 1 *Mass. Rep.* 125. *Fishwick vs. Sewell*, 4 *Har. and John*. 428. *Angel on Lim.* 297, 298. And though such possession may subsequently become adverse, that will not influence the rights of the parties, unless the fact of such adverse holding is known to the mortgagee sufficiently long to perfect the statutory bar before he institutes proceedings to vindicate his rights. A clandestine holding is of no avail. *Angel*, 72. *Calles vs. Tolson's Ex'rs*, 6 *Gill and John*. 80.

It has been said however, that as the bill does not pray a sale of the increase, as well as the original stock of slaves, that therefore, on that account, the sale is erroneous. The answer to this is, that the increase is regarded as an improvement merely of the property, an incident to it; and as liable to be sold, without specific mention, as the interest of the debt is recoverable, without a specific prayer for that purpose. A decree for the sale of the increase, not being inconsistent with the specific prayer, is warranted by the general prayer. *Wilkin, et al, vs. Wilkin*, 1 *John. Ch. R.* 111. *Field vs. Beeler*, 3 *Bibb*. 18. *Crews vs. Pendleton, &c.* 1 *Leigh*. 297. The defence founded upon the forbearance of the mortgagee is equally untenable; such forbearance, unless continued for twenty years, being applauded, rather than condemned, and censured by the courts. *Hudson vs. Warner and Vance*, 2 *Har. and Gill*, 415. *Holmes, et al, vs. Crane*, 2 *Pick. Rep.* 610. *Haven vs. Low*, 2 *New Hamp. Rep.* 13.

RANDALL, for the appellee.

It is shown by the evidence, that the boy which alone is the subject of the present controversy, was constantly in the possession and use of the appellee, and consequently, there was no necessity for recording the bill of sale.

1. In a court of equity, the mortgagor is esteemed the real owner, and the mortgagee merely an incumbrancer. 1 *Cov.*

Powl. 159. 2 *Doug.* 630, and the former is entitled to the rents and profits. *Cov. Powl.* 155, 157. 4 *Kent Com.* 158, and with respect to slaves, their owners have an interest in the issue, distinct from the parents, as is evident from the power to manumit future increase by the owner of the mother. The property in such increase, is considered as wholly separate and independent of the parent. One may be entitled to the one, and another to the other, and consequently, although the mortgagee may be regarded as the owner of the mother, it by no means, follows that he is the proprietor of the issue.

In the case before the court, sound policy clearly forbids a decision in favour of the appellants. The issue is not mentioned in the mortgage, and therefore, the public have no means of knowing where the title is, and they should be secured in dealing with the possessor, as the legal proprietor. If in so doing, the rights of the mortgagee are invaded, he has no one to blame but himself, for not introducing expressions into the instrument under which he claims, by which the public would be put upon their guard. Without such expressions, strangers would be exposed to imposition. *Watkins vs. Harwood*, 2 *Gill and John.* 310. When the boy in question was conveyed to the appellee, how could he know that he was touched by the mortgage? He was not mentioned *eo nomine*, nor were words used, calculated to put him upon the inquiry. If then, an innocent party is to suffer, the blow should fall upon him, by whom the mischief has been inflicted.

But independently of this view, which so strongly recommends itself upon principles of public policy; and considering the issue of female slaves, in the light merely of rents and profits, the claim of the appellants to have them sold for the payment of their debt cannot be justified, because, though a mortgagee in possession, may be entitled to the rents and profits, it is only when he is in possession, that he is so entitled; and then he must account for them, as an offset to the interest on the mortgage debt. He does not take them as his own absolutely, and unaffected by the rights of the mortgagor.

2. There is evidence to show, that the appellants knew of the possession of the appellee, and knowing it, they were bound promptly to assert their rights if they had any, least by their laches, (as has actually resulted, the remedy of the appellee over against the mortgagor, for the purchase money should be lost. The appellants not only permitted the appellee to rely upon his title, as a good one, but to incur the expense of raising the boy. Although therefore, as a general rule it may be true, that the mortgagee injures himself by forbearing; he does not do so, when the subject of the mortgage is young negroes. In such a case, if he can have them raised and rendered more valuable by third persons, he benefits himself at their expense, which in legal construction is a fraud.

3. Limitations are a bar, and the defence is well set up in equity, where it is seldom formally pleaded, it being always sufficient to rely upon it, no matter how informally, provided the party against whom it is to operate has notice. In controversies among creditors, the course of the court is to receive the objection at any time, regardless of the manner in which it may be interposed. Substance, and not form is aimed at, and when the former is accomplished, the court never listens to objections founded upon the latter.

STEPHEN, Judge, delivered the opinion of the court.

The question presented by the record to this court for adjudication is a new one, and has now for the first time engaged its attention. In deciding upon it, but little assistance can be obtained by an appeal to the rules and doctrines of the *English* law, and the only aid which can be derived from that source, must be drawn from a course of reasoning, founded upon the grounds and principles of analogy, as the *English* jurisprudence does not recognize the rights of property, in the subject matter upon which the mortgage in this case is made to operate.

In the discussion of this subject, the relative rights of mortgagor and mortgagee are involved, and upon them essen-

tially depends the issue of this controversy. The nature and extent of these rights respectively, this court upon a recent occasion was called upon to decide; and perhaps it is not going too far to say, that the views then entertained and expressed by this tribunal, must very materially influence the decision of this case. In 6 *Gill and John*. 74, this court say, “upon the execution of the mortgage the legal estate becomes immediately vested in the mortgagee, and the right of possession follows as a consequence, subject only to the occupancy of the mortgagor, which is only tacitly permitted until the will of the mortgagee is determined. It is said in 1 *Powel on Mortg.* 171, that as soon as an estate in mortgage is created, the mortgagee may enter into possession, but as the payment of interest is the principal object of the mortgagee, he seldom avails himself of that right, unless obliged so to do, to receive the payment of the interest, or with a view to compel the payment of the money.”

Of the accuracy of the preceding view of the relative rights of the mortgagor and mortgagee, no doubt can be entertained, because, it necessarily results from the legal operation of the terms of the instrument, by which the mortgage is created.

By the deed of mortgage, the legal estate becomes vested in the mortgagee, defeasible at law upon the performance of the condition and payment of the money at the time stipulated; but upon default of the mortgagor in the non-payment of the money at that time, it becomes indefeasible at law, and defeasible only in equity, where the mortgage is considered only as a security for the debt, and the mortgagor, notwithstanding his default, will be permitted to redeem. It is true in 2 *Burr.* 978, *Lord Mansfield*, in delivering the opinion of the court, says, “a mortgage is a charge upon the land, and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will, not made and executed with the solemnities required by the statute of frauds. The assignment of the

debt, or forgiving it, will draw the land after it as a consequence; nay it would do it, though the debt, were forgiven only by parol; for the right of the land would follow, notwithstanding the statute of frauds."

But in *Doug. Rep.* 22, his lordship at a later period of his judicial life, in deciding that a mortgagee might recover in *ejectment*, (without giving notice to quit) against a tenant claiming under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee, held the following language, "when the mortgagor is left in possession, the true inference to be drawn is an agreement, that he shall possess the premises at will in the strictest sense, and therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power express or implied, to let leases not subject to every circumstance of the mortgage." And the *Supreme Court of the United States*, in speaking upon the subject of the title passed by the deed of mortgage, and the interest acquired by the mortgagee, in the thing mortgaged, express themselves in the following terms, "it is true that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more. It is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law.

"It does not consider the estate of the mortgagor as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense, that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible." From these decisions, it results that the mortgagee must be considered as having an estate or interest in the subject matter of the mortgage, not absolute it is true,

because such an estate is not imported by the terms of the mortgage deed, but an interest commensurate with the object contemplated to be attained by it, as a security for the payment of the debt due from the mortgagor to the mortgagee. From these general views and considerations, relative to the respective rights of the parties to the instrument of mortgage, we are led to the consideration of the question arising in this case, and involved in the decision of this controversy. And that question is, whether the issue of a female slave, herself, the subject of the mortgage, born after the title of the mortgagee has become absolute at law, and during the possession of the mortgagor, is liable for the payment of the mortgage debt. For it must be borne in mind, that the question is not, whether the mortgagee is entitled to hold the issue as his own property in absolute right, but as security for the payment of his debt only. Upon the fullest consideration we have been able to bestow upon the subject, aided by all the lights and information with which we have been furnished, by an examination of the decisions of the courts of our sister *States* upon similar subjects, we have come to the conclusion that right and justice require, that the issue so born should be liable, and that neither the principles of law or equity forbid it. In the language of *Lord Mansfield*, before adverted to, when speaking of the growing crop, when possession is taken by the mortgagee, we think, "all is liable to the debt on payment of which the mortgagee's title ceases."

This identical question has been decided in the *State of Kentucky*, and there put to rest. The case may be found in 1 *Litt.* 317, where the court speak as follows, "nor can there be any doubt, but that the children born of *Fanny*, after the execution of the mortgage, are as much liable as *Fanny* herself is, for it is a settled rule, that the offspring belongs to the owner of the mother, for *partis sequitur ventrem*, is a maxim of the common, as well as of the civil law."

In the case before this court, the title of the mortgagee had become absolute at law when the issue was born. In a court

of law therefore, his title to the mother had then become absolute and indefeasible, and he must of course be entitled at law to her offspring born during such his title, subject to the equitable right of the mortgagor to redeem in equity, on payment of the mortgage debt. This view of the subject is confirmed by the rule of law which is held to prevail in a case somewhat analogous. In *Story on Bailments*, 200, he says, “by the pledge of a thing, not only the thing itself is pledged, but also as accessory, the natural increase thereof—as if a flock of sheep are pledged, the young afterwards born are also pledged.” And if such is the principle in the case of a pledge, where only a special property passes *fortiori*, ought the rule to obtain in the case of a mortgage, where the whole legal title passes conditionally to the mortgagee, and more especially where by forfeiture, the title has become perfect and absolute at law. In page 197, the same author in speaking of the difference between a mortgage of goods, and a pawn, says, “a mortgage of goods is in the common law, distinguishable from a mere pawn. By a grant or conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee, and if not redeemed at the time stipulated, the title becomes absolute at law, though equity will interfere to compel a redemption. But in a pledge a special property only, as we shall presently see, passes to the pledgee, the general property remaining in the pledger.”

We do not deem it necessary, further to discuss this question, or to extend our remarks for the purpose of proving the justice of the claim of the mortgagee; though much might be said under that aspect of the case, as we consider the law to be clearly established in his favour. We will only remark in conclusion, that we are happy to find that in this instance, the law of the land, and the law of nature, so far from being at variance are in perfect harmony; and that whilst on the one hand, full and ample justice will be administered to the honest creditor, the claims and feelings of nature will not be violated on the other.

Sellman vs. Bowen.—1836.

We do not think, that the defence founded upon the bar arising from the act of limitations, can avail the appellee in this case, even if he has placed himself in a situation to claim the benefit of it, because the proof in the cause does not bring home to the appellants, or either of them, a knowledge of his adversary claim, for a sufficient length of time to make the bar available.

Upon the whole we think, that the decision of the court below was incorrect, and ought to be reversed with costs in both courts.

DECREE REVERSED WITH COSTS IN BOTH COURTS.

ELIZABETH SELLMAN vs. RICHARD BOWEN.—*June, 1836.*

In an action at law for dower against the alienee of the demandant's husband, the defendant pleaded the non-seizure of the husband during the coverture. The verdict on that issue and the judgment was for the demandant. Upon a bill in equity between the same parties, to recover mesne profits, *it was held*, that the proceedings at law were conclusive evidence of the seizin of the demandant's husband, and evidence that in the first proceeding, her marriage was admitted.

General reputation, cohabitation and acknowledgment are sufficient evidence of marriage in all cases, except in actions for criminal conversation and in prosecutions for bigamy.

In ordinary applications to equity for a decree for dower, and for rents and profits, where the seizin of the husband is denied, it is the course of that court to send the parties to law, to litigate the legal question, while in the meantime, they retain the bill.

The case of *Steyger and Hillen, 5 Gill and John. 133*, explained, in relation to recovery of damages from the alienee of demandant's husband.

A widow can only, in equity, recover damages from the alienee of her husband, for the detention of her dower. A court of law cannot award them.

The alienee of a husband seized of land, after the husband's death, who receives the rents and profits, is considered in equity as a trustee or bailiff to the extent of the widow's claim for dower, and cannot defeat the claim for mesne profits by pleading limitations.

A widow who sues the alienee of her husband, at law for dower, may after her recovery, then sue him in equity for rents and profits.

Rents and profits are decreed to the widow of one seized during coverture, as against his alienee, from the time of demand made by the widow, and are estimated according to the improved value of the premises and from the time the improvements, if any, were made.

APPEAL from *Chancery*.

The appellant in December, 1832, filed her bill in the court of Chancery, to recover from the appellee, the alienee of her husband, (who died in 1817,) a portion of the rents and profits of a lot in the *City of Baltimore*, of which she alleged her late husband had been seized during the coverture. The bill charged and it was in proof, that after the death of her husband, she had recovered her dower in the property in question by a proceeding in the *Baltimore* county court; but as her husband did *not* die seized, she alleged, that no judgment could be had at law for the rents and profits, which it was the object of this bill to recover from the period of his death.

The answer denied the seizin of the husband; put the complainant to the proof of the marriage; and insisted, that her laches and neglect, in not making her demand earlier, in consequence of which, the defendant had been induced to expend large sums of money on the premises, had deprived her of all right to call for an account of the rents and profits, if she ever had any. It also relied upon the plea of the statute of limitations, and the proceedings in *Baltimore* county court, which court the defendant insisted, was competent to grant all the relief sought by the present bill.

A number of witnesses were examined in reference to the seizin of the husband, the marriage, and the value of the rents and profits from the death of the husband, after which the Chancellor, (*Bland*) at March term, 1835, dismissed the complainant's bill with costs.

From this decree the complainant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

GLENN and SPEED, for the appellant, contended :

1. That the parol evidence, independently of the proceedings in *Baltimore* county court, (which themselves are con-

clusive upon the questions,) abundantly prove both the seizin and marriage. But admitting that a doubt might be raised if the case rested upon the parol proof alone, the evidence furnished by the record of the recovery in *Baltimore* county court, is altogether conclusive. That judgment was between the same parties, and involved the very questions of coverture and seizin. It is as conclusive in its influence upon this case, as would be a judgment in ejectment, in a subsequent action for the mesne profits. *Fenton vs. Reed*, 4 *John. Rep.* 54. 8 *Wend.* 661. The parol evidence is of general reputation and cohabitation, which is sufficient proof of marriage, except in cases of bigamy and *crim. con.*

2. Limitations are no bar to the present proceeding, because no such impediment could be interposed to an action of dower. If the principal, the dower, cannot be barred, how can the incidental right to the profits. *Steiger vs. Hillen*, 5 *Gill and John.* 133. 8 *Wend.* 661. *Wells vs. Beall*, 2 *Gill and John.* 468. 1 *Roper on Property*, 466, 467, 468, 469.

3. The judgment of the *Baltimore* county court, presents no defence to the present proceeding, as that court could not have given the relief sought by this bill. By the common law, the courts could not give damages in actions of dower. The jurisdiction for that purpose was conferred upon them by the statute of *Merton*, which is applicable only to those cases in which the husband *dies seized*. *Doctor and Student*, 141. 2 *Bac. Abr.* 392, (*dower.*) *Park. on Dower*, 301, 302, 307. *Roper on Prop.* 433, &c. 4 *Kent Com.* 65.

If the want of jurisdiction in the county court had been even doubtful, a court of equity having undoubted jurisdiction will give relief. *King vs. Baldwin*, 17 *John. Rep.* 384, 388, 389. That courts of equity have jurisdiction in cases of this description, cannot be disputed. *Mitf. P.* 110, 111. 1 *Fonb. Eq.* 19, 20. *Hale vs. James*, 6 *John. Ch. R.* 258. 3 *Dessau*, 535. In regard to the defence urged upon the ground of the staleness of the demand, they insisted, that the proof established a demand as early as 1817, soon after the

death of the husband. No such proof however, was necessary; the case of *Steiger vs. Hillen*, having decided, that the claim may be preferred at any time during the life of the widow.

RANDALL, for the appellee.

1. In a bill for rents and profits, the widow must show such a seizin, as would entitle her to dower in the property itself. No inferior grade of proof will be sufficient; and she must also prove a marriage in fact, and cannot recover upon mere evidence of general reputation and cohabitation. 1 *Saund. Pl. and Ev.* 485.

2. The proceeding in the *Baltimore* county court is an insuperable bar to a recovery here. The writ in that case, was a writ for dower and damages, of which the court had full jurisdiction. The complainant submitted her cause to that court, and its judgment consequently is final. Dower is a legal demand, and the courts of Chancery only assumed jurisdiction, to obviate certain difficulties, inseparable from legal proceedings. The two courts now have concurrent jurisdiction in cases of dower, and there is no difficulty in the recovery of damages in the legal forum, even against the alienee of the husband. 11 *Law Lib.* 138. *Park on Dower*, 302. *Steiger vs. Hillen*, 5 *Gill and John*. 133. When the husband has aliened, the widow can only recover damages from the date of her demand, either at law or in equity. 11 *Law Lib.* 152. *Park*, 332. 4 *Kent Com.* 65. The two courts having concurrent jurisdiction, and the plaintiff in this case having separated the *corpus*, the dower, from the accessory, the rents and profits, cannot now recover the latter. 11 *Law Lib.* 142. *Park*, 310. *Pre. in Ch.* 97. *Wilson vs. Gott*, 6 *Gill and John*. 309. In all the cases in which rents and profits have been decreed, the bill has associated with them a claim for dower. The separate recovery of each, leads to a multiplicity of actions, and should, for that reason be discountenanced.

3. The plea of limitations is a bar to this bill. The cases in which the courts have repudiated the plea, are cases in which both *dower*, and rents, and profits have been claimed. The claim for the latter is protected, because of its connection with the former, that being a subject to which limitations are inapplicable. But when they are disconnected, the claim for rents and profits falls within the scope of the statute. 4 *Kent Com.* 69. In every case of a bill to account limitations are a bar. 3 *Dessau*, 535. *Steiger vs. Hillen*, 5 *Gill and John*. 133.

ARCHER, Judge, delivered the opinion of the court.

The complainant having recovered her dower at law, seeks by this bill the rents and profits from the death of her husband.

The seizin of the husband is denied ; and the defendant puts the complainant to the proof, not only of the seizin, but the marriage.

The complainant anterior to the filing of this bill to recover rents and profits, had instituted suit in *Baltimore* county court, for her dower. In this suit the seizin of the husband was directly in issue, and the marriage by not being denied, was admitted. The verdict and judgment in that cause, being between the same parties, where the same issue was in controversy must at all events, as to the seizin, be considered in this controversy as conclusive ; and as the demandant in the suit at law, could not have recovered without proof of marriage, or its admission, the effect of the record perhaps, ought to be considered as equally conclusive of the marriage as the seizin ; the marriage not having been denied, but the cause being put to the jury on the issue of seizin. But without proceeding to any determination upon this branch of the subject, the proof of marriage in the record before us is abundant ; if general reputation, cohabitation, and acknowledgment, can in such a case be considered as evidence, and of this we have no doubt. Such evidence is sufficient in all cases except in actions for criminal conversation, and in

prosecutions for bigamy. *Morris vs. Miller*, 1 Wm. Black. Rep. 632.

In ordinary applications to equity for a decree for dower, and rents and profits, when the seizin of the husband is denied, it is the course of this court to send the parties to law, to litigate the legal question, while in the meantime they retain the bill.

Between these parties however, before the filing of this bill, the legal right had been tried and settled, and every question had been adjudicated by a court of common law, which in any shape the cause could assume, would fall within their peculiar cognizance.

The complainant therefore meets with but three difficulties in addition to those above adverted to, in the recovery of the rents and profits which have been withheld from her.

1. It is supposed that having sued for her dower at law, she might there have recovered her damages, and having failed to recover them at law, she has lost them every where. If there exist a right to recover damages at law, and the plaintiff at law failed to recover them, looking to the state of the record, it is probable that the matter must be considered as *res adjudicata*, and that it cannot form the subject of a new litigation, but the judgment already passed has foreclosed the plaintiff. It must be conceded, that in the case of *Steiger and Hillen*, 5 Gill and John. 133, countenance is given to the doctrine that *at law*, the widow may recover from an alienee of the husband her damages. The suggestion was not necessary to the determination of that case, and having been fully discussed in this case, and the doctrine more deliberately examined, we have brought our minds to the conclusion, that it is only in a court of equity that the rule will apply, that a widow is entitled to her damages from the alienee of her husband, and that consequently, a court of equity is the only and peculiar forum for their recovery in such a case. The following authorities would appear conclusively to establish the doctrine. *Doctor and Student*, 140. 141. *Roper on Prop.* 435, 443. 2 John. Rep. 119. *Jenkin's Cent.* 1 Ch. 85. *Park. on Dower*, 391.

2. That the rents and profits are but incidents of the right to dower, and the dower having been recovered at law, the bill from the incidents cannot be maintained without having the support which they would derive from an application at the same time for the principal. If it be true, that the widow could not have recovered them at law in this case, and that for the dower itself, courts at law and equity have concurrent jurisdiction, the result of such a principle, would in all cases be to defeat the widow of her damages, where she pursues her remedy at law; and such a doctrine would be attended with this further result, that in all such cases, the jurisdiction of the courts of law, of the principal (the dower) would be practically ousted, for no one would ever go to law to recover her claim to dower, when she is to be pursued with the inevitable penalty of a loss of rents and profits. An argument leading to such consequences cannot be maintained. Besides the respondent who is the recipient of the rents and profits; of that which in fact belonged to the wife, ought to be, and is considered in the mind of the court of equity as a trustee, or bailiff, and accountable for his stewardship, and it cannot be perceived how with any legal propriety, the compulsory recovery of the principal which has been unjustly withheld, should produce the effect of stripping the defendant of his character of trustee, with which he had been clothed, in order to enable a court of equity to do justice, when the same reason precisely ought to continue after the recovery of dower as before. A widow may expressly, or by implication waive her right to rents and profits, but certainly a recovery at law to the extent to which she could recover, cannot be considered as waiver of any thing.

3. It is supposed that the complainant is barred by limitations. Had she pursued her claim, both for dower, and for rents and profits in a court of equity, she would not have been barred, and we understand this to have been conceded in the argument. But if it were not conceded, it is established by authority. Mesne profits as damages, are given at law under the statute of *Merton*, without restriction as to

time, and when they are decreed in equity to the widow, the like account will be taken; courts of equity applying limitations only, in analogy to limitations at law. *Roper on Prop.* 448. In 9 Ves. 222, after the lapse of twelve years' rents and profits were decreed, the master of the rolls observing, that there was no reason for depriving her of the account, if she was not barred at law.

Shall then the circumstance of her having sued at law for her dower, and in equity afterwards for her rents and profits make any difference in this respect? We think not. The character of the claim, and all the legal principles which might go to support or defeat it remain unchanged, and ought to be applied to it, when presented to the court in this isolated shape, as would attach to it, when combined with a claim for dower.

The decree of the Chancellor is reversed with costs, and this court, when an account shall be prepared by an auditor to be appointed by this court, will decree rents and profits from the time of the demand proven in the cause; which rents and profits are to be estimated according to the improved value of the premises, from the time the improvements were made.

DECREE REVERSED WITH COSTS IN BOTH COURTS.

EDWARD McMECHEN vs. THOMAS MARMAN.—June, 1836.

The purchaser of land sold under a *fi. fa.*, applied to the county court for a writ of *habere facias possessionem*, under the act of 1825, ch. 103, against one in possession, under title subsequent to the rendition of the judgment on which the *fi. fa.* issued. It appeared that the judgment debtor had only an equitable interest in the land levied on, holding a bond of conveyance from the owner of the fee, and which bond he had assigned to the tenant in possession before the *fi. fa.* issued. Upon due proof of demand and failure to surrender possession to the purchaser, it was *Held*, that he was entitled to a writ of *habere facias possessionem*.

The act of 1825, ch. 103, is remedial in its character, and should be liberally construed to carry into full effect the designs of the legislature. The evil

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intended to be remedied by it was, that debtors and those claiming under them after a sale of their lands by the sheriff, held on to their possession until ousted by the tedious process of ordinary judicial proceedings, both legal and equitable estates in land are within its operation.

Equitable estates are primarily liable to sale under a *fi. fa.* in the same manner that legal estates are.

The county court in this cause having refused to issue a *hab. fac. pos.* and this court having reversed their judgment, ordered a *procedendo*. That writ having been issued, the court here countermanded the *procedendo* at the next term, and awarded a writ of *hab. fac. pos.* to issue from this court.

APPEAL from *Frederick* county court.

This was an application by the appellant, for a writ of *habere facias possessionem*, under the act of 1825, ch. 103.

In his petition which was filed on the 4th of November, 1834, he stated, that he became the purchaser of certain lots in the City of *Frederick*, on the 16th of May, 1834, at a sheriff's sale made to satisfy two judgments rendered against one *Solomon Rank*, at February and October terms, 1833. That since his purchase, he had demanded possession of the defendant, who held the same by title subsequent to the dates of the judgments, but refused to surrender the possession, and the appellant therefore prayed, that a rule might be laid on the appellee or party in possession, to show cause within the first four days of the next term, why the writ of *habere facias possessionem*, should not issue.

The writs of *fieri facias* were issued on the 8th of March, and 5th of April, 1834, returnable to the then ensuing, October term.

After proof that the possession had been demanded, and that the appellee had failed and refused to deliver it, the county court on the 4th of November, 1834, passed a rule, "that the said *Thomas Marman*, show cause within the first four days of February term, 1835, why a writ of *habere facias possessionem*, shall not issue to the sheriff of *Frederick* county, commanding the said sheriff to deliver possession of the premises aforesaid to the said *McMechen*, as the purchaser thereof, provided that a copy of the rule be served upon the said *Marman*, at least twenty days before the first day of February term, 1835.

Service of a copy of the rule being proved, the appellee at February term, 1835, exhibited the following causes against the issuing of the writ.

1. That before the issuing of the writs of *fi. fa.* under which the property was sold, the said *Rank* had assigned all his interest therein to the appellee, for a valuable consideration.

2. That *Rank*, at the date of the rendition of the judgments, upon which the writs were issued had no such title or interest in the property sold, as could be bound or reached by said judgments.

3. That at the time said judgments were rendered, and at the time the writs were issued and levied, the said *Rank* held in fee simple in *Fredericktown*, real property, fully sufficient to satisfy the judgments, without resorting to the property sold.

4. That the appellee did not at the time of the sale, and does not now hold the said property, so as to render it liable to be reached by the writ of *habere facias possessionem*, under the act of 1825, ch. 103.

5. That the sale under the *fi. fa.* was fraudulent and void, the sheriff or auctioneer having refused a *bona fide* and responsible bid, higher than that at which the property was sold to the appellant.

6. That the proceedings, sale and return by the sheriff under the writs were defective, irregular and void.

In support of these reasons, the appellee filed a bond of conveyance from *Levi Davis* to the said *Rank*, for the lots in question, dated on the 27th of December, 1830, with an assignment thereof by the obligee, to the appellee in this case dated March 3d, 1834, and purporting to have been made for a valuable consideration paid to the assignor by the said *Marman* and his daughter.

The county court on the 3d of March, 1835, discharged the rule, and thereupon the appellant appealed to this court.

The cause was argued before STEPHEN, DORSEY, CHAMBERS, and SPENCE, Judges.

WORTHINGTON, for the appellant.

In this case three questions arise :

1. Is a judgment a lien at law, on an equitable interest?
2. Does the act of 1825, ch. 103, authorize the county courts to order a *habere facias possessionem*, in favour of the purchaser of an equitable interest, under a *fieri facias*, issued by said courts.

3. Whether a judgment is or is not a lien at law, on an equitable interest, can a person in possession holding under the debtor by title subsequent to the judgment, set up such title in bar of the writ of *habere facias*, under the act of 1825, ch. 103, if that act embrace the sale of an equitable interest?

In discussing the first question, it may be necessary for the purpose of understanding and elucidating the acts of our legislature and the practice of our courts, to trace the lien of judgments *ab ovo*. At common law no such lien existed. The only process by which a judgment creditor could reap the fruits of his judgment, was by a *fieri facias* against the goods, chattels and leasehold lands of the debtor, and a *levari facias* against the rents and growing profits of his lands, until the debt was satisfied. The military policy of the feudal system forbade the tenant from severing the tie between himself and his lord, by the alienation of the fief, and as a consequence from encumbering it with his debts, whereby it might be in the power of the creditor to deprive him of the possession, and transfer it to another tenant, who might not be as acceptable to the lord as the debtor himself. But when restraints on alienation began to yield to more enlightened considerations, the creditor was less advantageously situated than when these restraints were in full life. The creditor could then levy the rents and growing profits of the land until his debt was extinguished, but after alienations were allowed the debtor might deprive him of this resource by transferring the land to another. For the judgment did not at common law bind the land, and a *levari facias* bound only the growing profits. The creditor could not therefore, pursue the lands in the possession of the alienee. His

remedy against the freehold lands of the debtor was thus defeated. Thus stood the condition of the creditor at common law. The judgment was no lien on the land itself, nor on goods, chattels, or leasehold lands, and a *fi. fa.* bound goods, chattels and leasehold estates, only from its *teste*. To afford a more effectual remedy against the lands of the debtor, the statute of *Edward the first*, called the statute of *Westminster the second*, was passed, which gave to the judgment creditor his election to sue out either a writ of *fi. fa.* or else that the sheriff should deliver to him all the chattels of the debtor, (save his oxen and beasts of the plough) and also one-half of his land, until the debt was levied upon a reasonable price or extent. The goods and chattels under this statute, were delivered to the creditor at a reasonable price or appraisement in satisfaction of his debt, and one-half the land delivered *quosque debitum satisfactum fuerit*. There are no express words in this statute, by which a judgment is made a lien on land, nor does it specify what species of land shall be extended, but judicial writers and the courts here confined its operation to freehold and leasehold lands, and the *lien* of the judgment to a moiety of the *freehold* lands, only which the debtor held *tempore redditionis judicii*, or which he might subsequently acquire. It is said to be a lien on freehold lands, because it enabled the creditor to obtain possession of one half of the debtor's lands, or *because the lands are liable to the execution of the creditor whenever he pleases to sue out writs for that purpose*. 1 Cov. Pow. 274, note (b.) The statute directs the sheriff to deliver to the creditor one-half of the debtor's lands, but does not designate the lands he held at any particular time, whether such as he held at the date of the judgment, or at the time of suing out the *elegit*, but the courts have fixed the *punctum temporis* at which the lien attaches to such lands as he held at the date of the judgment, and to such as he subsequently acquired. If the statute were to be construed literally, the directions to the sheriff to deliver a moiety of the debtor's lands, would seem to embrace such lands only as the debtor had at the time the

elegit comes into the sheriff's hands. For if he had aliened them they were no longer his property, and the sheriff could not deliver *as the lands of the debtor* such as he had aliened prior to the *elegit*. Yet the courts here decided that the sheriff should deliver a moiety of the lands, the debtor held at, and subsequent to the date of the judgment, whether they remain in his possession or not; and this construction has been given *because a moiety of the lands is liable to the execution of the judgment creditor*. The construction has been different as to the chattels and leaseholds, because they were liable at common law to a *fi. fa.* and by that law they were bound only from the *teste* of the *fi. fa.* Leaseholds are considered goods, and the word "goods" in the statute of frauds, has been decided as embracing them, when it makes a *fi. fa.* binding on goods from the delivery of the writ to the sheriff. It has then been settled, that under the statute of *Westm. 2*, a judgment binds only freehold lands. The reason given, that freehold lands are bound, *because they are liable to the execution of the judgment creditor*; equally applies to leaseholds, as they are liable to the *elegit* of the creditor under the same statute; yet a judgment does not bind leaseholds, because they were liable at common law to be sold under a *fi. fa.* like goods and chattels, and judgments were therefore never considered as binding them under that law. The creditor would in almost all cases prefer a *fi. fa.* to an *elegit*, in the case of leaseholds, as by an *elegit* he could extend but one half of the leaseholds, when by a *fi. fa.* he could sell the whole. It has also been decided, that copy-holds are not embraced by the statute of *Westm. 2*, although it speaks of land generally, and a copy-hold even at this day is governed by the feudal principle, and cannot be affected by a sale or seizure to satisfy a judgment. Under the statute of *Westm. 2*, no other than the legal estate in a freehold or leasehold can be extended; and under a *fi. fa.* nothing but the legal interest in goods, and chattels, and leaseholds, can be sold under the *English* law. The judgment therefore, was a lien only on the legal estate in freehold lands, and a *fi. fa.*

was a lien only on the legal interest in goods, and chattels, and leaseholds, because in the one case none but the legal estate could be extended, and in the other none but the legal estate in goods, chattels, and leaseholds, could be sold under a *fi. fa.* No equitable interest could be extended under the statute of *Westm. 2*, and of course a judgment could not bind it; and no equitable interest in goods, chattels, and leaseholds, could be sold under a *fi. fa.* and therefore, the *fi. fa.* did not bind it. A judgment did not bind an equitable interest at law, *because the judgment could not reach it at law*; it could only reach it in equity. It therefore, bound in equity without notice, if docketed, but if not docketed, but only entered on the paper roll and signed, it did not bind without notice. The doctrine of legal and equitable lien depends mainly upon this distinction. 1 *Cov. Pow.* 275, *note.* *Ib.* 276, *note.* *Ib.* 277, 278, 279, *note.* We come now to the statute of 29 *Charles 2*, ch. 3, sec. 10. That statute made it lawful for every officer to whom a precept was directed upon any judgment, “to do, make and deliver execution unto the plaintiff of all such lands, tenements, tythes, rents and hereditaments, as any other person should be in any manner of wise, seized or possessed in trust for him against whom execution is so sued, like as such officer might or ought to have done, if the said party against whom execution should be, had been seized of such lands or of such estate as they be seized of in trust for him, *at the time of the said execution sued.*” After uses had been united to the possession by the statute of *Henry 8*, trusts succeeded them, but they were not liable to be extended under an *elegit*, or sold under a *fi. fa.* They were generally, fraudulent and covenous, in which the *cestui que trust* had the whole real beneficial interest, and the trustee the naked formal title only. The statute of frauds enabled the judgment creditor to extend the trust lands, in the seizin of the trustee in the same manner as if the judgment debtor had been seized thereof, and they could therefore, be affected only by extending a moiety until the debt was satisfied. The judgment lien is negatived

by the directing words to do and make execution only of such lands of, as the trustee was seized of, *at the time of the said execution sued*, and the same were to be held and enjoyed, “freed and discharged of all incumbrances of the trustee.” 1 *John. Ch. Rep.* 52. The lien is thus expressly confined to the suing out, or the delivery of the *elegit* to the sheriff. If this statute had not by express words, restricted the lien to the time of the execution, the general words, “to do, make and deliver, would, I presume, have been entitled to the same construction as the statute of *Westm.* 2, and the judgment would here bind the *equitable* in the same manner as the *legal* estate is bound by that statute. Under the statute of *Charles* 2, it has been decided, that the entire equitable interest at the time of the execution, must be in the *cestui que trust*, and the naked legal title only outstanding in the trustee; and on this ground it has been held, that an equity of redemption is not liable to an execution under that statute, because only a partial equitable interest is in the mortgagor, the mortgage debt being a lien thereon. If the trustee has only the naked legal title it is covenous *per se*, but if he has any beneficial interest a court of law will not interfere, but leave the creditor to his remedy in equity, and will not undertake to decide whether it is covenous or not. But under this statute, even when the entire equitable interest is in the *cestui que trust*, the trust estate cannot be sold under a *fi. fa.* An equitable interest in no case, either under this statute, or at common law, or under any other *English* statute, is liable to be sold under a *fi. fa.* and it is only liable to an *elegit*, in the single case in which the entire equitable interest is in the *cestui que trust*, and the naked legal title only in the trustee, at the time of the execution. The only instance in which lands in *England* can be reached by *fi. fa.* is against the legal estate of leaseholds. Neither the equitable interest in a leasehold, nor the legal or equitable interest in freehold, or the equitable interest in goods and chattels can be reached by a *fi. fa.* All equitable interests, including an equity of redemption, can only be reached in equity, except

the single instance provided for by the statute of *Charles 2*, where the entire equitable interest is in the debtor and the naked legal title in his trustee, at the time of the execution sued out. The only instances in which lands in *England*, can be reached at law by a judgment creditor are, first, by a *fi. fa.* or *elegit* against the *legal* estate in *leasehold* lands; second, by an *elegit* against the *legal* estate in *freeholds*, and third, by an *elegit* against *trust* lands, under the statute of *Charles 2*. So stood the *English* law prior to the statute of *George 2*. The statutes of *Westm. 2*, and *Charles 2*, were intraterritorial; that of *George 2*, was extraterritorial, and it was a radical innovation on existing remedies in the plantations and colonies to which its operation was confined. Not only was the totality of the debtor's lands subjected to the payment of his debts, but they were made liable in the same manner as goods and chattels. This statute was intended for the benefit of *British* creditors only, but our *State* courts have applied it, also, to domestic creditors, and the practice since that statute has been to sell lands under a *fi. fa.* in the same manner as goods and chattels. There is nothing in this statute, which by express words, makes a judgment binding on a moiety or the whole of the debtor's lands, but it did in effect make them binding on the whole, by subjecting them to the execution of the judgment creditor. If judgments are liens in this *State*, by virtue of the statute *Westm. 2*, they bind only a moiety. If it be not by virtue of the statute of *George 2*, that a judgment binds *all* the lands of the debtor, by what law do they bind the entirety? They do not at common law, not even a moiety. By the statute of *Westm. 2*, they bind only a moiety. They must bind the *whole*, then, under the statute of *George 2*, because by that statute the whole of the debtor's lands is *subject to the execution of the judgment creditor whenever he pleases to sue it out*. At the time of the passage of that statute, the statute of *Westm. 2*, was in force in this *State*, and the goods and chattels of the debtor were appraised and delivered to the creditor in satisfaction of his debt, and a moiety of his lands

extended. But soon after the enactment of the statute of George 2, the remedy by *elegit* was abandoned, and judgment creditors since have always had recourse to a *fi. fa.* as well against lands as against goods and chattels. *Kilty's Rep. Stat.* 249. It was at one time decided by the late general court, that a judgment did not bind lands under the statute of George 2, but, that like goods and chattels, they were bound only from the delivery of the *fi. fa.* to the sheriff. 1 *Har. and John.* 473, *note.* The same judges, whether before or after this decision does not appear decided, that a senior judgment creditor might reach lands, in the hands of a purchaser under a junior judgment, and re-sell it in satisfaction of the first judgment. 3 *Har. and McHenry,* 449, and the practice has conformed to the decision last mentioned. It is now generally considered, that a judgment when rendered by a court of record, binds the whole of the debtor's lands against all subsequent incumbrances, and that a judgment creditor may reach them thus bound, in the hands of a subsequent alienee, whether conveyed by the debtor himself, or sold under execution to satisfy a junior judgment. I will here concede for the sake of the argument, that prior to the act of 1810, ch. 160, which I shall presently notice, none but the legal estate in lands could be sold under a *fi. fa.* whether freehold or leasehold, except under a judgment of condemnation in attachment, in which case it has been decided, that an equitable interest might be attached, condemned and sold under a *fi. fa.* 5 *Har. and John.* 316. I conclude, therefore, on a view of the whole subject, that by virtue of the statute of George 2, a judgment binds the legal estate in the *whole* of the freehold lands of the debtor, because the *whole* is by that statute *made liable to the execution of the judgment creditor.* The statute did not embrace leaseholds, because at common law they were subject to a *fi. fa.*

We come now to an equitable interest in lands, as affected by the laws of this State. In the case of *Campbell and Morris*, the late general court was of opinion, that an equitable interest was not liable to *attachment*, because it was not tangible,

and could not be seized or taken into custody. 3 Har. and McHenry, 557. The opinion was delivered by judge Chase. Lord Ellenborough, entertained a similar opinion in the case of a *fi. fa.* These two learned judges indulged so much in abstractions, that one thought it impossible that an attachment could reach an equitable interest, and the other that a *fi. fa.* could not reach it. 8 East. Rep. 467. They seemed to think it a shadow, some “unreal mockery,” some “aeriform being,” some “air drawn dagger,” that eludes the sight as well as the touch, so that it could not be taken into custody or seized. But what Lord Ellenborough—*clarum et venerabile nomen*—thought impossible, our legislature achieved with a few bold strokes of the pen. By the act of 1810, ch. 160, “it shall be lawful for any sheriff or other officer to whom any writ of *fi. fa.* shall be directed to take, seize and expose to sale any equitable interest or interests, which the defendant named in such writs may have or hold in any lands, tenements or hereditaments.” This wise act of our legislature has put to flight these metaphysical subtleties, mixed up with the dialectics and categories of Aristotle, and the whole cognate brood will ere long, I hope, be driven to their ancient fastnesses, by the *genius* of reason and common sense operating through the philosophy of legislation. It is no longer impossible to take, seize and expose to sale an equitable interest. It is made an object of two of the senses at least, touch and sight, for without the “touch” it could not be taken, and without the “sight” it could not be exposed to sale. The legislature, then, has put an end to this argument of impossibility, and an equitable interest can be taken, seized and sold under a *fi. fa.* The construction, then put on the statute of Westm. 2, must by parity of reason, be put on the act of 1810, ch. 160. If a judgment is a lien on the legal estate, under the statute of Westm. 2, because the legal estate is subject to the execution of the judgment creditor, it is a lien on the equitable interest, under the act of 1810, because the equitable interest is subject to the execution of the judgment creditor. Next comes the act of 1825, ch. 103.

By that act the court shall order possession, if the debtor refuses to deliver possession to the purchaser, or any person claiming under the debtor, by title *subsequent* to the judgment. Why did the legislature confine the claim of title to a point of time subsequent to the judgment, if the judgment did not bind? The sense of that body cannot be doubted. The judgment was considered a lien, and therefore, if the party in possession claim the same, by title subsequent to the judgment, he claims against the lien, and therefore, his claim shall not avail him. This is as conclusive as a declaratory act on the subject, and it ought so to be construed. The language of the act is positive and unequivocal. It can bear but one construction, that no title acquired *subsequent* to the judgment shall be set up in opposition to the writ of *habere facias*, authorized by that act. This act applies to the sales of all interests in lands, whether legal or equitable, and the purchaser of an equitable interest is as much entitled to possession under it, as the purchaser of a legal interest. The act makes no distinction and intended to make none. It was passed subsequent to the act of 1810, and no doubt it intended to embrace sales under that act as well as sales of the legal interest. The act of 1825 says, whenever any lands or *tenements* shall be sold, the word "tenements" will embrace an equitable interest. Tenement means any thing that may be *holden*, provided it be of a permanent nature. An equitable interest may be holden. It is so declared by the act of 1810. The sheriff shall take, seize and expose to sale any equitable interest or interests which the debtor may have or "*hold.*" 2 *Blk. Com.* 16. We now come to the act of 1831, ch. 290. This act puts beyond doubt, the sense of the legislature on this subject. By the 6th section of that act, it is enacted "that no judgment rendered by a justice of the peace, unless and until the same shall, on appeal, be affirmed by a county court, be deemed and taken to be a lien on any lands, tenements, or real estate or estates, or any interest therein, legal or *equitable.*" It shall not be a lien *unless or until affirmed*, will

make it a lien, by necessary implication *when* affirmed. It shall not be a lien unless affirmed, but when affirmed, it shall be a lien and not before. This negative is as pregnant with an affirmation, as the one mentioned in *Litt. Rep.* 65; which carries an affirmation in its belly. If a judgment of a justice of the peace binds an equitable interest in lands, when affirmed by a county court, will it be contended that a judgment of the same court, in a case originating there, does not also bind? Does our legislature present such a hideous anomaly? Such a fatuitous absurdity? This would be maintaining that the judgment of a county court, in its appellate capacity, stands upon higher grounds than judgments under its original jurisdiction, and that judgments of the same court are not alike binding. Why does the judgment of a justice of the peace bind an equitable interest when affirmed? Because it is the judgment of the county court, and because all judgments of that court are alike binding on such interests, and this is taken for granted by the act last mentioned. I will now proceed to examine another provision of the act of 1831, ch. 290, in support of the second position for which I contend. The 5th section of this act provides “that the act of 1825, ch. 103, and the supplements thereto, shall be deemed and taken to extend and apply, and are hereby extended and applied to sales by constables or sheriffs as aforesaid, ratified and confirmed as aforesaid to every effect, intent and purpose, as if such sales had been specifically mentioned in said act and the supplements aforesaid; and the writ of *habere facias possessionem*, in said acts and supplements provided for, may be issued by the county court to which the proceedings as to said sales shall be returned as aforesaid, and be by said court acted on and with, as if the execution under which such sales shall have been made, *had issued from said county court, on a judgment therein recovered.*” It is further provided by the second section of the same act, “that it shall and may be lawful for any constable or sheriff by virtue of any *fi. fa.* or on any judgment rendered by a justice of the peace, to seize

and sell the rights, title, claim, interest and estate, at law and in equity of the party or parties against whose property said execution shall have issued, to, and in, and out of any lands or tenements and real estate," &c. Taking the acts of 1810, 1825 and 1831 together, and we must conclude, that the act of 1825, ch. 103, does embrace the sale as well of an equitable as of a legal interest in lands, and that the purchaser of an equitable interest under a *fi. fa.* issued by a county court, is equally entitled to a writ of *habere facias* under that act, as the purchaser of an equitable interest under a *fi. fa.* issued by a justice of the peace. The act of 1810, as well as the act of 1831, embraces all interests in lands, whether legal or equitable, and the purchaser under both acts ought to be placed on the same footing. If the act of 1825, does not embrace the sale of an equitable interest under the act of 1810, our laws present an extraordinary spectacle. They enable a purchaser of an *equitable interest* under an execution issued by a *justice of the peace*, to obtain possession of lands purchased by him, in a summary mode under the act of 1825, but the purchaser of an equitable interest, under an execution issued by a *county court*, cannot obtain possession under that act.

In support of the third position I contend, that if the act of 1825, embrace the sale of an equitable interest, it is immaterial whether the judgment be a lien or not. The party in this case claims by title subsequent to the judgment, and such defence is expressly shut out by that act. The courts are expressly authorized to give summary possession to the purchaser, against the debtor himself, and any person holding under him, *by title subsequent to the judgment*. If then, the court should decide that the act of 1825, ch. 103, embraces the sale of an equitable interest, the third position is necessarily established. From the foregoing inquiry it results, that according to the *English* law, a judgment binds at law, the legal estate in freehold land, because it may be enforced at law, against the legal estate; that, according to the same law, it does not bind at law an equitable interest,

because it cannot be enforced at law, against the equitable interest, except under the statute of *Char. 2*, when the legal estate is in the seizin of the trustee, at the time of the execution sued out; that the reason given why, by the *English* law, a judgment does not bind at law, an equitable interest, because it cannot be enforced at law against the equitable interest, goes to show that it does bind an equitable interest by the *Maryland* law, because it can be enforced at law against an equitable interest; that as a general proposition, a judgment binds at law an estate in lands, whenever it can be enforced at law, and that it binds in equity, whenever it can be enforced in equity; that if it binds the *legal* estate, under the statute of *West. 2*, because it is liable to the execution of the judgment creditor, it must for the same reason bind the equitable estate under the act of 1810, ch. 160, because that act makes it liable to the execution of the judgment creditor; that the act of 1825, ch. 103, embraces the sales of all interests in lands, whether legal or equitable, as it makes no distinction between such interests. That if it do embrace the sale of an equitable interest, then, it is immaterial whether the judgments are a lien or not, as the person holding the possession claims under the judgment debtor, by title subsequent to the judgments. *Cited*, 1 *Cov. Pow.* 274, note, 277, 278, 279, note. *Ib.* 281, 282, note. *Ib.* 308, note. 2 *Cov. Pow.* 601, text, 603, text. *Ib.* 605, note, 606, note, 612, note. *Ib.* 608, text, 598, text. *Stat.* 13, *Ed.* 1, ch. 18. *West. 2.* 29 *Char. 2*, ch. 3, sec. 10. 5 *Geo. 2*, ch. 7, *Acts of Assembly.* 1810, ch. 160. 1825, ch. 103. 13, ch. 290. 1 *Har. and McHenry*, 473, note. 3 *Har. and McHenry*, 449, 557. 5 *Har. and John.* 316. 5 *Gill and John.* 1.

WM. SCHLEY, for the appellee.

The question is, whether a judgment from its date, is binding upon an equitable interest in lands held by the judgment debtor; because, although the defendant himself might not be allowed to urge the infirmity of his title, in opposition to

the application of the purchaser to be put in possession, a third person, such as the appellee, cannot be so restricted.

In *England* unquestionably, judgments are not liens upon equitable interests. 2 *Powl.* 598, 602, 603. And the same doctrine has been repeatedly announced by the courts in this country. *Bogart vs. Perry*, 1 *John. Ch. R.* 56. *Bogart vs. Perry*, 17 *John. Rep.* 353. *Hendricks vs. Robinson*, 2 *John. Ch. R.* 312. *Hopkins vs. Stump*, 2 *Har. and John.* 304. It appears from the bond of conveyance from *Davis* to *Rank*, the defendant in the judgment, that the whole purchase money had not been paid, and consequently the obligor in that bond, was not seized wholly for the use of the obligee. To the extent of the sum due on the bond, he was seized to his own use. The purchaser acquired the title of *Rank*, and no more. Unless therefore, the judgment operated as a lien upon the property from its date, the possession of *Rank's* assignee cannot be disturbed.

Under the act of 1810, ch. 160, the purchaser of an equitable estate, besides paying the purchase money, is required to get an assignment, or conveyance from the sheriff. The act of 1825, ch. 103, only speaks of lands and tenements, which do not technically mean equitable estates. By them are understood freeholds at common law; that is, their legal and technical meaning, and when used by the legislature, they are to be construed in their technical sense. 1 *Cov. Powel*, 604, note (z.)

The act of 1816, ch. 154, which employs the words, "lands," &c. did not authorize the sale of equitable estates belonging to infants, for which a remedy was provided by the act of 1818, ch. 193. sec. 7.

Parties being by the act of 1825, deprived of the privilege of the trial by jury, its provisions should not be extended by construction. It should be confined to cases of undoubted liens, the more especially, as it applies not only to the defendant in the judgment, but to persons who acquire from the defendant subsequently to its date.

DORSEY, Judge, delivered the opinion of the court.

In shewing cause against the issuing of the *hab. fac. poss.* six grounds have been assigned by the appellee; the 5th and 6th of which appear to have been abandoned in the argument, and we are not aware of any thing in the record, upon which they could have been sustained. The third ground we deem wholly untenable. Equitable estates being primarily liable to sale under a *fieri facias*, in the same manner that legal estates are, and there being nothing in the transaction, from which the court could impute fraudulent, or improper motives to any person concerned in the levy and sale that has been made, nor is there a shadow of proof of the fact alleged, “that at the time of the rendition of said judgments, and at the time of issuing said *fi. fa.* and at the time of the levying of said *fi. fa.* the said *Solomon Rank* held, in fee simple in *Fredericktown*, real property, fully and amply sufficient to satisfy said judgments and *fi. fa.* without coming upon the property sold.” The insufficiency of the first and second causes assigned, has been settled by this court, in the case of *Miller vs. Allison and others*, decided at the present term; in which it was held, that a judgment was a legal lien upon an equitable estate in lands, and bound them from its date, and not merely from the date of the *fi. fa.*

The fourth ground alone, remains to be considered, viz; whether the purchaser of such an estate, at a sheriff's sale, can obtain possession under the provisions of the act of assembly of 1825, ch. 103; the *first* section of which, provides, “that whenever any lands or tenements shall be sold by any sheriff, coroner, or elizor, by virtue of any process of execution from the Court of Appeals, court of Chancery or any county court; and the debtor or debtors named in said process, or any other person or persons, holding under such debtor or debtors by title subsequent to the date of the judgment or decree, shall be in the actual possession of the lands or tenements so sold, and shall fail or refuse to deliver possession of the same to the purchaser or purchasers thereof, it shall and may be lawful for the court to which such process

shall be returnable, on the application of the purchaser or purchasers of the said land and tenements, his, her or their agent or attorney ; and on no good cause having been shown to the contrary, by the said debtor or debtors, his, her or their agent or attorney, or other person concerned, within the first four days of the term, next succeeding that to which the said process was returnable, to issue a writ, in the nature of a writ of *habere facias possessionem*, reciting therein, the proceedings which may have been had on said process, thereby commanding the said sheriff, coroner or elizor, as the case may be, to deliver possession of the said lands or tenements, to the purchaser or purchasers thereof.”

This act of assembly is remedial in its character, and therefore should be liberally construed, in order to carry into full effect the designs of the legislature. The evil intended to be remedied, was that debtors and those claiming under them, after a sale of their lands by the sheriff, held on to their possession, until ousted by the tedious process of ordinary judicial proceedings ; thus against every principle of law and equity, without the ability of making ultimate indemnity for their wrong doings, depriving purchasers for years of all enjoyment of the lands they had honestly paid for ; during which interval, it is more than probable, that those lands were greatly diminished in value, by a most severe and exhausting cultivation. The necessary consequence of such a state of things must be the sacrifice of the interests of creditors, by depreciating the value of that fund, from which the payment of their debts is to be sought.

The mischief complained of, operated with like severity on purchasers both of legal and equitable estates. The legislature therefore could have had no adequate motive for discriminating between them ; for denying to one what was freely granted to the other. The mischief to be removed was the same in both cases ; the remedy provided equally applicable to each class of purchasers ; not a word to be found in the law intimating any distinction between them. Upon what recognized principle of construction then, can we

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under the act of assembly withhold from the one, what is conceded the other.

Believing that the county court erred, in refusing the writ applied for in this case, *we reverse their judgment. Let a writ of habere facias possessionem issue from this court.*

JUDGMENT REVERSED.

THE WILLIAMSPORT AND HAGERSTOWN TURNPIKE COMPANY *vs.* JOSEPH HOLLMAN.—*June, 1836.*

Subscribers under a charter creating a company to make a road and before such road is located—only look to a location in conformity with the terms and intention of the charter.

When a charter directs the officers of the corporation to appoint commissioners to lay out a road in the *nearest and best direction* between two points, and they proceeded to mark and lay out the road accordingly, it is no deviation from the charter, that the managers alter the location at a particular part so as to shorten the road.

APPEAL from *Washington* county court.

This was an action of *assumpsit*, commenced by the appellant against the appellee, on the 12th of November, 1834, to recover the instalments on certain shares subscribed by the appellee, to the capital stock of the company.

Issue was joined upon the plea of *non assumpsit*. At the trial, the plaintiffs read to the jury their charter of incorporation, passed at December session, 1832, ch. 125, and a book of subscriptions to the capital stock of the company, taken by the commissioners appointed by the act, which was annexed thereto, and which book contained the following superscription, to the names of the subscribers, that is to say: “We whose names are hereunto subscribed, promise to pay for the stock subscribed by us respectively, according to the provisions of the charter of the *Williamsport and Hagerstown Turnpike Company*.” And it was admitted by the defendant that he had subscribed in said book, for twelve shares of the capital stock of the company, by the names of *Joseph Holl-*

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man, Benjamin F. Hollman, John H. Hollman and Joseph Hollman, Jr. and that at the time of subscription, he paid the sum of one dollar on each share so subscribed. That the managers for said company were duly elected on the 2d of September, 1833, and that they had called in said stock, in three instalments of five dollars each, on each share, of which several calls, they gave two months' previous notice, agreeably to the provisions of the act. It was further admitted, that commissioners were appointed on the 5th of September, 1833, for the purpose of making a location and plat of said road, in conformity with the 9th section of the act, which duty the said commissioners performed, and returned and reported the same to the managers on the 23d of October, 1833. That after said road had been located, and a plat thereof returned as aforesaid, by the said commissioners, the managers changed the said location at one point of the road, near the town of *Williamsport*, and departed from the location and return of the commissioners at that point, and made a different location, for a distance of about thirty perches, which change shortened the distance of said road; but that the termination of said road at the town of *Williamsport* was not changed by said managers. It was further admitted, that the managers had made and completed said road, and reported the same to the governor of the state, in pursuance of the charter, and that examiners were appointed by the governor to view said report, and report thereon; and that said examiners did report to the governor, that said road had been constructed agreeably to the provisions of the act of assembly, and that afterwards the governor issued his license to said Turnpike company, authorizing them to erect gates on said road, for the purpose of demanding and receiving tolls for travelling thereon.

It was admitted by the plaintiff, that the commissioners to be appointed by virtue of, and under the ninth section of the charter, did not take the oath prescribed thereby. That the defendant entered a protest, against the change of the location, at the time it was made, and never acquiesced therein.

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The defendant then prayed the opinion and direction of the court to the jury, that if they should be of opinion, from the evidence in the cause, that the managers of said Turnpike company, changed the location of the road as hereinbefore stated, after the same had been surveyed, and a plat thereof returned to them by said commissioners, and after the defendant had subscribed for said stock, that then the plaintiffs are not entitled to recover for any instalment called in after said change. Which opinion *Buchanan, Ch. J.* and *Thomas Buchanan, A. J.* gave to the jury. The plaintiffs excepted, and the verdict and judgment being against them, they appealed to this court.

The cause was argued before **STEPHEN, DORSEY, CHAMBERS, and SPENCE, Judges.**

Yost, for the appellant, contended :

That the commissioners being the mere creatures of the president and directors, it was competent for the latter to reject, or adopt their location at pleasure. It was competent for the president and directors to have located and selected the route themselves, and consequently when located by persons of their appointment, they were authorized, either to sanction or reject their act.

JOHN R. KEY, for the appellee.

The charter forms a part of the contract, and a violation of the former is a violation of the latter,—unless therefore the requisitions of the ninth section of the charter, have been complied with by the plaintiffs, they are not entitled to recover the instalments from the defendant. That the requirements of the ninth section were designed to be binding, is shown by the act of 1831, ch. 206. A corporation must strictly pursue its charter, and therefore instalments directed to be called in, in a particular mode, must be called in, in that mode and no other. 4 *Wheat. Rep.* 636. A deviation from the terms of the charter, releases the subscribers from their subscriptions. 13 *Eng. C. L. Rep.* 174. And the change of

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the location of a road, takes from the corporation the power to enforce the payment of subscriptions. 8 *Mass. Rep.* 268.

STEPHEN, Judge, delivered the opinion of the court.

The question involved in this case lies within a very narrow compass. It arose in an action of *assumpsit*, instituted in the court below by the appellant against the appellee, to recover a certain sum of money, due on twelve shares of stock subscribed for by the appellee, who resisted the recovery upon the ground of a violation of the terms of the contract of subscription; the ground of the defence was sustained by the court below, and the right of recovery, thereby defeated. The only provision of the act of incorporation, upon which any thing like the semblance of a contract can be founded, is to be found in the *ninth* section thereof. That section authorizes the president and managers of the company to appoint three commissioners to lay out the road, in the nearest and best direction, from the *eastern* limits of the town of *Williamsport*, to the town of *Hagerstown*; and after having laid out and marked said road, they are directed to make out a plat of the same, specifying the courses and distances, and return said plat to the president and managers.

It is to be observed, that this law emphatically makes it the duty of the commissioners, in designating the course the road was to run, to locate it in the *nearest* and *best* direction. If then the provisions of this section can even be considered as entering into the essence of the contract between the parties, we do not think that the appellee can invoke to his aid, the provisions which it contains, under the facts agreed to exist in this case. It is distinctly admitted, that in changing the location of the road as marked out by the commissioners, the president and managers of the company, so far from infringing the provisions of the law, strictly complied with the letter of its requirements, by shortening the distance, and that the termination of the road at the town of *Williamsport*, was not changed by such alteration. Under this aspect of the case it appears to us, that the president and managers in changing

the location, so far from violating the principles of good faith and fair dealing with the appellee as a subscriber for stock in their company, acted strictly within the pale of their authority and only fulfilled a duty required of them by the charter of their incorporation. At the time the appellee became a subscriber for stock, no location had been given to the road, except that which the law prescribed; to such location only, could he have looked at that time as an inducement to subscribe; and we think that nothing has since occurred in the conduct of the company, or their agents, of which he has a right to complain. Therefore there is no ground upon which he can claim to be discharged from the obligation to pay the money, resulting from his subscription, as he has substantially obtained, or might have obtained all he contemplated when he became a subscriber, and that nothing has been done on the part of the company, which would lead to a forfeiture of their right to enforce such obligation by judicial process. With these impressions of the law and justice of the case, we are of opinion, that there is error in the judgment of the court below, and that the same ought to be reversed.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

DAVID HOFFMAN vs. PETER GOLD.—*June, 1836.*

The testamentary system admits no power of delegation in any person entitled to administration of the estate of a deceased party.

The act of 1819, ch. 187, which declares that when any seaman, &c. shall die intestate, &c. letters of administration upon his estate shall be granted in preference, to some officer of *The Charitable Marine Society*, having no words giving it a retrospective operation; there being nothing in the nature of its enactments to demand it; and neither the interests of the Society nor the security of the claim being dependent upon it, can according to its language only have a prospective operation.

The testamentary laws have made provision for every case to insure an administration with promptness. If a party dies leaving very near relations, they are to be summoned, if within the *State*, or an effort is to be made to summon them; more remote relations and creditors next have the

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preference, *if they apply*. In the absence of such application, the court can exercise a discretion, and in doing so, should undoubtedly, as a general rule pursue the policy of the system, and commit administration to the person having the greatest interest in the estate.

In 1835, application was made by an officer of *The Charitable Marine Society*, for letters of administration on the estate of a seaman, who died abroad in ———. This was resisted by H, having the funds of the deceased in his hands, and claiming to retain a portion of it for services rendered. The deceased having no kindred. *Held*, that H, on proving himself to be a creditor would be entitled to administration; and that in the absence of such proof, the *Orphans' Court* could grant letters in their discretion.

The presumption of slavery arising from colour, upon an application for administration of an estate, is sufficiently rebutted in relation to the grant of letters, by the fact that the deceased engaged in a voyage to foreign ports as a sailor, that his wages which constituted the known part of his estate had been recovered at law in his name, and not been claimed by any owner after the lapse of many years.

The master or owner of a slave may recover from one to whom letters of administration had been granted, and who had recovered in that character property due for the services of such slave.

APPEAL from the *Orphans' court* of *Baltimore* county.

On the 16th December, 1835, *Peter Gold* filed his petition charging that *Clement Oakes*, a mariner, belonging to the port of *Baltimore*, shipped as a seaman on board the ship *Warren*, which sailed out of the aforesaid port in the year 1806, on a voyage to the *Pacific Ocean*, where the vessel arrived, but was seized by the Spanish authorities, and the crew made prisoners; that wages for said voyage have been recovered for, but not received by said *Oakes*; that he is dead, intestate and without next of kin, as far as appears in the *United States*, and that it has become the duty of the court, to grant letters of administration upon his estate, in preference, to some officer of the *Charitable Marine Society of Baltimore*, upon conditions prescribed in the act of 1819,—that the said *Gold* is an officer of said society, and has made his application within ten days after notice of the death of said *Oakes*, has been left at the office of the *Register of Wills for Baltimore county*, and publication thereof for five days in in one of the daily newspapers, printed in the *City of Baltimore*. Prayer for letters of administration on the estate of said *Oakes*.

The appellant appeared in the Orphans' court, and filed objections to the granting of letters as prayed to *Peter Gold*, and insisted that if any letters were granted they should be issued to the appellant.

He admitted *Oakes'* death, &c. urged in substance, that the claim of *Oakes* to wages, was prosecuted by him at great expense and cost in the *District, Circuit and Supreme Court of the United States*, from the years 1810 to 1832, he set forth the various expenses to which he had been put in relation to the claim of this and the other seamen of the ship *Warren*, exceeding the sum of \$9,000—that his compensation was contingent; that on the recovery of the claims, he had made great efforts to discover the parties, their heirs and representatives—that he had paid off most of the claimants or their representatives, and was willing and ready to pay the others—that the *Marine Society* had no claim to the fund, and he claimed to retain the fund subject to his demands for reimbursement of advances made in the prosecution of *Oakes'* claim for wages, and his compensation as proctor—that in addition to his character of proctor, he was trustee of the fund and had executed a bond in the penalty of \$20,000 for the due performance of the trust—that he claims a preference in the administration of the unsettled estates in his hands—first as *creditor* and secondly as *trustee*—that *Oakes* was a slave—his master's name unknown—that he had settled many of their cases upon highly liberal terms, expecting that others of them would never be called for—in many cases making no charge, &c. that as proctor, trustee and creditor, he is sole owner in law and equity of this fund, until called for by the actual owner and his legally proved heirs—personal representatives, assignees or agents—that the proof of the claimant is defective.

After proof taken on both sides, which is sufficiently adverted to in the opinion of this court, the *Orphans' court* decreed, that letters ought to be granted to some officer of the *Charitable Marine Society of Baltimore*, and as it was admitted that *Gold*, was an officer of that society, letters were

decreed to him, on his giving bond with security and taking the oath required by law. From this decree the said *David Hoffman* appealed.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, and CHAMBERS, Judges.

The act of 1819, ch. 187, declared, that when any seaman or mariner sailing from or residing in the port of *Baltimore*, shall die intestate and without heirs, as far as appears, in the *United States*, letters of administration upon the estate of such seaman or mariner shall be granted in preference to some officer of *The Charitable Marine Society of Baltimore*; provided that such officer shall make application for the same within ten days after the notice of the death of such seaman or mariner, shall be left at the office of the *Register of Wills for Baltimore county*, and publication made thereof at least five days in some newspaper printed in the *City of Baltimore*.

MAYER and R. JOHNSON, for the appellant, contended:

1. That there was no sufficient evidence of a dying intestate and without heirs of the said *Charles Oakes*, within the meaning of the act of 1819, ch. 187, as entitled the appellee to administration on his estate; nor any evidence of a general or habitual sailing by him from the port of *Baltimore*, which proof it is insisted is essential to the appellee's claim for letters.

2. That under the circumstances of the case, the appellant was entitled to administration.

3. That the evidence shows that *Oakes* died a slave, and of course that no administration could be granted on his estate.

4. That the act of 1819, under which alone the *Marine Society* can and do claim the administration, is altogether *prospective* and applicable only to cases of mariners dying intestate and without heirs, subsequent to the passage of that act; and of course admitting, that there is a sufficiency of

evidence, that *Oakes* died intestate and without heirs, as it also proves that the death was long prior to that act, the right of administration is to be decided independent of it, and under the general testamentary act, and consequently that appellee was not entitled to the administration.

WILLIAMS (*District Atty. U. S.*) for the appellee, contended.

1. That there is sufficient evidence of the dying intestate and without heirs, as far as appears in the *United States*, and that they sailed from the port of *Baltimore*.

2. That the appellant has shown no claim to administration—because the prior right of the society prevails against creditors—because no evidence that the appellant is a creditor—and his answer admits he is a debtor.

3. That there is evidence that *Oakes* was a free man and none that he was a slave.

4. That the society are entitled by the act of 1807, ch. 123, to the property left by said seaman; and in being so entitled the Orphans' court ought to grant the letters of administration to an officer of that society, because of its superior interest in his estate.

5. That the act of 1819, ch. 187, is not prospective only.

CHAMBERS, Judge, delivered the opinion of the court.

The only question brought before this court by the record, is, whether the Orphans' court under the circumstances of this cause, should have passed the decree ordering letters to be delivered to the appellee.

In the view we have taken of the cause, it will be entirely unnecessary to decide upon the right of *The Charitable Marine Society*, to be considered as sole distributee, but that right may be assumed, to give the utmost effect to the appellee's argument.

It is contended, that the appellee is entitled to letters as matter of right. That the act of 1807, ch. 123, gives the estate of the deceased to the society. That by the policy of

the testamentary system, as adopted and declared by this court, the right of administration should follow the right to the estate, and therefore the appellee is entitled of right, as the appointee and agent of the society. We cannot admit the conclusion.

The testamentary system admits no power of delegation in any person entitled, and if it cannot be exercised by the nearest of kin, who is most favoured in this respect, it will be difficult to sustain a claim for such a power by this corporation.

It is said however, that the act of 1819, ch. 187, expressly confers the right of administration upon an officer of the society appointed for that purpose, and that the object and language of that act, will justify its application to a case originating before its passage.

There are no words in that act giving it in terms a retrospective operation; there is nothing in the nature of its enactments to demand it, nor are the interests of the society, or the security of the claim dependent upon such a construction. On the contrary, the act professes to provide a rule for cases, in which the death of the party should thereafter occur, and by considering it entirely prospective, its letter is gratified; the established rule of construction obeyed, and the society for any demand it may have, can resort to the ample security—the administration bond; which the Orphans' court is bound to exact in every case, for the very purpose of protecting both creditors and distributees.

We do not think therefore, that by any positive provision, or any constructive principle of law, the appellee can demand letters as matter of right. Neither was it a case for the discretion of the court. The testamentary laws have made provision for every case, to insure an administration with promptness. If the party died leaving very near relations, they are to be summoned if within the *State*, or an effort is to be made to summon them; more remote relations and creditors next have the preference, *if they apply*. In the absence of such application, the court can exercise a discre-

tion, and in doing so, should undoubtedly as a general rule, pursue the policy of the system and commit administration to the person having the greatest interest in the estate.

The peculiar language of the paper filed in the Orphans' court by the appellant, makes it doubtful whether he intended it as an application for letters. It would rather seem to be a *caveat* against the grant of letters to the appellee, upon the grounds distinctly stated in the fifth of his reasons, and which relate to the title of the fund claimed by the appellee as the agent of the society.

The title to that fund was not a proper subject for that court, in that form, at that time.

Conceding that the case is within the act of 1807, so as to entitle the society to the estate ultimately, yet as the death of the party occurred before 1819, the creditor, "if he applied," was entitled to letters in preference to an agent or officer of the society.

There would seem however to have been an error in this respect, common to the court and to both the parties.

Letters were claimed by the officer and agent of the society, upon the ground of their title to the estate of the deceased. The application was resisted upon the ground that the society had no legal claim to the fund in the hands of the appellant, and the decree of the court, although it does not in terms declare the title of the society to be the reason why letters are ordered to be granted to the appellee, does allege expressly, that letters ought to be granted to some officer of the society, and orders them to be issued to the appellee, because he is admitted to be one of its officers.

This erroneous assumption may account for the fact, that there is no proof given to shew, that the appellant is a creditor, although it is manifest from the statement filed by him in the Orphans' court, that he must have expended large sums of money, and much time and labour in establishing the claims of the deceased, the proceeds of which claims, constitute the funds in his hands.

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But the nature of the appellant's claim upon these funds, or the trust in virtue of which he holds them, cannot affect the question now before us.

This court cannot know, nor can the Orphans' court, whether there be other property or effects of the deceased, nor can any litigated question affecting the right to these funds be determined in this mode.

If the appellant shall insist on his right to letters as a creditor, he will not lose the opportunity to protect the rights of property, in, or over this fund, and if failing to apply or to prove himself a creditor, letters shall be granted to the appellee, the question of property will still be open to both parties, and all the rights of the appellant may be defended without prejudice from the act of the court granting letters.

The cases so nearly resemble each other, that we have deemed it unnecessary to remark on either, separately. The most material point of distinction which was taken in the argument, was in relation to *Clement Oakes*, who is proved to be a coloured man, and in regard to whom, it is thence urged that his colour is presumptive evidence of his being a slave. Whatever might be said, if the issue was a direct one, as to his slavery or freedom, upon which we mean not to express an opinion, we think that the fact of his engaging in the voyage as a sailor, the absence of any claim by an owner, and the recovery of wages in his name stated by the petition, and not denied by the *caveat*, are facts sufficient to repel that presumption, so far as to justify an administration to be had of his effects; considering that the rights of his master or owner may be enforced, if any such rights exist against the administrator.

Believing as we do, that the death of the parties is sufficiently established, we shall remand the case, with directions to the Orphans' court to grant letters to the appellant, if he shall apply for the same and prove himself a creditor—otherwise to grant letters at their discretion.

Decree of the Orphans' court reversed with costs, and record remanded accordingly.

DECREE REVERSED.

Richardson vs. Ridgely, et al.—1836.

ROBERT R. RICHARDSON vs. WM. A. RIDGELY, et al.

June, 1836.

R, the devisee and owner of a tract of land incumbered with the payment of a legacy, sold and conveyed it to E, with a general warranty. The purchaser executed a mortgage to R, to secure the unpaid part of the purchase money. After this A sold land to R, and took from him an assignment of E's mortgage, to secure his consideration money, which declared that A received the assignment of the mortgage without any sort of recourse to R, for the payment of the mortgaged debt, or any part thereof, he relying wholly upon the mortgage. On a bill filed by A, against R, to enforce an alleged lien on the tract sold by A, for the unpaid purchase money, it was held, that A, had no lien thereon.

APPEAL from the court of *Chancery*.

Charles W. Ridgely, by his will executed on the 13th day of September, 1810, devised a tract of land to each of his sons, encumbered with the payment of a legacy to his daughter *Ruth*, who afterwards intermarried with *John Baltzell*. *William A. Ridgely*, one of the appellees, sold the tract devised to him charged as aforesaid to *Edward Rider*, by deed, dated November 30, 1820, with a general warranty. *Rider*, on the day of the conveyance paid part of the purchase money, and executed to *Ridgely*, a mortgage of the same land to secure the payment of the balance. On the 17th of September, 1821, the complainant sold and conveyed to the defendant *Ridgely*, a tract of land for the sum of \$4,830, the consideration expressed in the deed, and to secure the payment thereof, took from *Ridgely* an assignment of the mortgage from *Rider* to him, in which the following expressions are used: "It being however, expressly declared and understood, that the present assignment is taken and received by the said *Robert R. Richardson*, without any sort of recourse to the said *William A. Ridgely*, or his representatives, for the payment of the said mortgage debt, or any part thereof, he relying wholly upon the said mortgage," &c. *Richardson*, the complainant filed a bill against *Rider* to foreclose the mortgage, in answer to which, the latter alleged and obtained an allowance for a deficiency in the quantity.

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On the 9th of July, 1824, *Baltzell and wife* filed their bill against the defendant, *Wm. A. Ridgely*, and the other devisees of *Charles W. Ridgely*, to subject the lands devised to them, to the payment of her legacy; and the complainant was compelled to pay the portion charged on the land devised to *William A. Ridgely*, the mortgage of which, by *Rider*, had been assigned to him as aforesaid.

The object of this bill, which was filed on the 20th day of August, in the year 1828, is to obtain a reimbursement of the sums thus allowed to *Rider*, and the amount paid *Baltzell* and wife, upon the ground, that to the extent of those sums, the mortgage debt was insufficient to pay the purchase money of the land sold by the complainant to *Ridgely*, the defendant.

The bill prayed a personal decree against *Ridgely*, and a sale of the land sold him by the complainant to satisfy the vendor's lien for the balance of the purchase money.

On the hearing the Chancellor, *Bland*, dismissed the bill with costs, and thereupon the complainant appealed to this court.

The cause came on to be argued in the Court of Appeals, before BUCHANAN, Ch. J. and STEPHEN, ARCHER, DORSEY, and SPENCE, Judges.

BREWER and MAYER for the complainant contended :

1. That *Rider* had under the warranty in his deed from *Ridgely*, a right to redeem on paying the residue of the purchase money or mortgaged debt, less the amount of the incumbrances, and on a foreclosure that alone could be recovered from him. 7 *Bac. Abr.* 247, 248. *Ten Broeck vs. Livingston*, 1 *John. Ch. R.* 357. *Judson vs. Wass*, 11 *John.* 525.

2. That *Richardson*, to whom the mortgage was assigned by *Ridgely* to pay a sum as large as the whole amount due upon it, could recover no more than *Ridgely*, and consequently the purchase money of the land he sold the latter, is unpaid to the extent of the incumbrance, which gives him a

right for that amount to look to *Ridgely*. *Sugden Vendors*, 347.

3. That he had the same right under the equitable obligation of every vendor to convey a good title, clear of incumbrances, to his vendee, and no more could be recovered from him on a bill to foreclose. *Dutricht vs. Melchor*, 1 *Dallas*, 428. *Dorsey vs. Jackman*, 1 *Serg. and Rawl.* 42. *Ib.* 53. *Steinham vs. Witman*, *Ib.* 438. 1 *Nott and McCord*, 190.

4. That he had a right to be allowed for the deficiency in the number of acres, both on the warranty, and upon equitable principles, independent of warranty. *Abbott vs. Allen*, 2 *John. Ch. R.* 519. *Stockton vs. Cook*, 3 *Mumford*, 68. *Van Eps vs. Corp. of Schenectady*, 12 *John. R.* 436. *Caswell vs. Black River Man. Co.* 14 *John. R.* 453.

5. That the concealment by *Ridgely* of this incumbrance, and of the deficiency in the quantity of land, from *Rider* and *Richardson*, was a fraud upon both, and he is bound in consequence to make good the injury which has been sustained by it.

6. That the lien on the land for the residue of the purchase money still exists; the land being in the hands of *Ridgely*, and mere volunteers under him.

7. That the allegations in the bill are ample to charge *Ridgely* with fraud; but if not, the exceptions are insufficient under the act of assembly, to enable the defendant to avail himself of the defect.

ALEXANDER, for the appellees, contended.

1. The consideration of the conveyance from the appellant to the appellee, *William A. Ridgely*, was the deed of assignment, from *William A. Ridgely* to the appellant. The agreement between the parties, being for a transfer of the right of the one party in the land conveyed, in exchange for the interest of the other in the mortgage assigned. *Jones vs. Sluby*, 5 *Har. and John.* 382. *Bre vs. Holbech*, *Douglass*, 654.

2. There is no ground whatever for imputing fraud, misrepresentation, or concealment on the part of *William A.*

Ridgely, in the transaction. On the contrary, it is apparent, the appellant had sufficient notice, or means of acquiring notice of every pretence of equity on the part of *Rider*.

3. That if the appellant has ever paid any moneys, as alleged in the bill, he made such payments without any just or legal cause, and such payments, were therefore made in his own wrong, for which the appellees cannot in any manner be responsible.

4. That if the appellant was responsible for the sums of money, which he may prove he has paid, he will yet have no claim to be reimbursed by the defendants, because the assignment by *William A. Ridgely* to the appellant, was made without any warranty, and expressly without recourse, and therefore, on a defect of title in said mortgage, the appellants could have no recourse whatever, against his assignor. *Winch. vs. Winchester*, 1 *Ves. and B.* 375. *Boar vs. McCormick*, 1 *Serg. and Rawl.* 166.

It is not pretended that *Rider* was evicted from any part of the mortgaged premises. So long as he remained in possession, he would not have been permitted to moot any question of title with his mortgagee. He was bound to pay the mortgage debt, and in case of future eviction to rely on his covenants. The appellant's responsibility must therefore have been the consequence of his own acts. *Sugden*, 350. *Abbott vs. Allen*, 2 *John. Ch. C.* 519.

The land conveyed by the appellant to *William A. Ridgely*, cannot be held responsible for any defect in the title to the mortgage assigned, as there is no stipulation whatever to that effect in either conveyance.

The lien of the vendor was discharged by taking an assignment of the mortgage. *Cood vs. Cood and Pollard*, 4 *Exch. Rep.* 314. *Fish vs. Howland*, 1 *Paige*, 20. 4 *Wheat. Rep.* 294.

SPENCE, Judge, delivered the opinion of the court.

The complainant in this cause aims to establish an equitable lien on certain real estate, conveyed by him to the respon-

dents by a deed dated the 17th day of September, 1821, for a part of the purchase money still due and unpaid as he alleges in his bill.

The complainant charges in his original bill that, "the consideration aforesaid which is expressed in said deed, was not paid to your orator at or before the execution and delivery of the said deed, but the said *William A. Ridgely*, assigned to your orator in payment thereof a mortgage from a certain *Edward Rider* to him;" and in his amended bill, the complainant charges that, "the consideration aforesaid which is expressed in the said deed, was not paid to your orator, at or before the execution and delivery of the said deed; but the said *William A. Ridgely*, assigned to your orator to secure the payment thereof, a mortgage from a certain *Edward Rider*, to him."

From the complainant's own shewing it is clear, that he took a distinct and independent security for the purchase money, and that he did not trust to the estate conveyed by him to *Ridgely*, as a pledge for his purchase money.

If we were embarrassed with doubts either as to the correctness or proper interpretation of the rule of law laid down in *Sugden on Vend.* 387, viz: "that where a vendor accepts a mortgage of another estate for the purchase money, the obvious intention of burthening one estate, being that the other shall remain free and unincumbered," "and that the vendor's lien on the estate is gone." We should be driven to this conclusion in the case now under consideration, by the express declaration and understanding of the complainant, as manifested in the assignment of the mortgage from the respondent to him, wherein the contracting parties express themselves in this strong and unequivocal language. "It being however expressly declared and understood, that the present assignment is taken and received by the said *Robert R. Richardson*, without any sort of recourse to the said *William A. Ridgely*, or his representatives for the payment of the said mortgage debt, or any part thereof, he relying wholly upon the said mortgage, upon the bonds or obliga-

tions given by him to said *Ridgely*, and referred to in said mortgage, and this day assigned by said *Ridgely* to said *Richardson*." It has been earnestly urged in the argument by counsel, that the complainant in accepting the assignment of the mortgage, did not waive his lien upon the estate conveyed by him, and that the mortgage failing to produce the amount of money for which it was accepted by him, that he could go over upon his equitable lien.

The conclusive answer to this argument is the complainant's own acknowledgment, expressed in the assignment of the mortgage, as to the terms upon which he accepted it, viz: that he received it without any sort of recourse to the said *William A. Ridgely*, or his representatives, for the payment of the said mortgage or any part thereof. From all which we are of opinion, that the lien of the said *Richardson*, upon the lands conveyed, was by him waived and is gone.

The complainant's counsel in their arguments insisted, that *Richardson* received the assignment from *Ridgely*, under a mistake produced by the misrepresentation of *Ridgely*, as to the actual amount due; but the record contains no proof to sustain the argument. The amended bill charges and avers, that when he, *Richardson*, agreed to take the assignment of the said mortgage as aforesaid, he was utterly ignorant of the said lien on said mortgaged premises, but the same was well known to the said *Ridgely*, and was fraudulently concealed by him from your orator.

We have carefully examined the record for the evidence to sustain this charge of imposition and fraud, but in vain. For from the complainant's own testimony it is almost demonstrable, not only that *Ridgely*, did not fraudulently practice upon and overreach the said *Richardson*, but that it was almost impossible that he could have done so, if such had been his design. He, *Richardson*, was the husband of *Ridgely's* sister, and derived as devisee under the same will of *Charles Ridgely*, a farm in right of his wife, by which *Ridgely* derived his title to the lands sold to *Rider*, and which was by him mortgaged to *Ridgely*, and the same land described in the

mortgage assigned to *Richardson*, and the charges now complained of, viz : *Baltzell's and wife's*, was a legacy to the sister of this complainant's wife, and charged upon the land by the same last will of their father, by which *Richardson*, derived the said farm in the right of his wife.

| Under these circumstances we cannot therefore but conclude, that *Richardson* was aware of the provisions of the last will and testament of *Charles Ridgely*, and consequently, aware of the incumbrances to which the mortgaged premises he accepted as a security for his purchase money might become liable under that will; and we also conclude, that the arrangement between *Richardson* and *William A. Ridgely*, was made with full knowledge of all the facts now relied on to impeach it, and that *Ridgely's* conduct in the transaction is clear of fraud, or proof of misrepresentation, or deception of any kind: viewing the complainant's bill in either aspect, either as a bill to enforce a lien, it has already been shown that no lien existed; that the nature of the original contract was inconsistent with the idea of a security of that description being reserved in this case—or as a bill claiming redress upon the footing of fraud or misrepresentation, that neither is sustained by proof; we are of opinion that the decree is in no respect erroneous, and *affirm the same with costs to the appellees*.

DECREE AFFIRMED.

THE MARYLAND SAVINGS INSTITUTION vs. JOHN
SCHROEDER.—*June, 1836.*

The depositor of a sum, weekly, in an incorporated Savings Institution, which he was entitled to withdraw at pleasure, agreed with and requested the institution to convert and vest his deposits permanently into stock of said company. Upon the conversion he received increased dividends and participated in its entire profits. The institution becoming insolvent, and receiving in the course of its settlements with its debtors, its own certificates of deposit in payment, which would absorb all its available funds.

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The depositor on the ground that a conversion of his money into stock was in violation of the charter of the company, applied for an injunction. *Held*, that whether the charter authorized it or not, he was not entitled to the restraining power of the court.

An application to a court of chancery for the exercise of its prohibitory powers or restrictive energies, must come recommended by the dictates of conscience and be sanctioned by the clearest principles of justice.

Where a party reaps profits by his own voluntary act, founded upon contract with another, he is not as against the creditors of such other party at liberty to vacate his contract to their prejudice, and claim to participate in equity and conscience, upon the insolvency of such other party, equally with his creditors in his estate and in opposition to the terms and effect of the original agreement.

A court of equity decrees the specific execution of a parol agreement, on the ground of part performance, and notwithstanding the express provisions of the statute of frauds. This is on the ground of fraud in refusing to perform after performance by the other party, and to prevent the statute from being an engine of that fraud, which it was enacted to prevent.

APPEAL from the court of *Chancery*, and from an order granting an injunction upon bill and answer.

On the 24th December, 1834, *John Schroeder* filed his bill in Chancery, charging, that at December session, 1826, *The General Assembly of Maryland*, passed an act incorporating certain persons, and all other persons becoming members of *The Maryland Savings Institution*, a body politic; granting them among other powers, that to regulate the manner of making and receiving deposits, the forms of certificates to be issued to depositors, and the transfers thereof—to provide for the investment of funds and admission of members. That the said corporation by its charter, was capable of receiving from any free person or persons any deposit of money, and that all money so received should be invested in public stocks or other securities, at the discretion of the directors, and in the manner deemed most safe and beneficial; and prohibiting expressly the loan of any of the said funds to any officer or director of said corporation. That in every year the directors should make a dividend of profits and pay the same to the depositors. That the said corporation was prohibited from doing any act inconsistent with the privileges secured to the existing banking institutions of the *State*

That the company was organized, and under the third and fifth sections of the first article of the by-laws, the complainant became a weekly depositor and so continued, until the receipt of a circular from the treasurer of said institution, he was required to discontinue depositing, at which time his deposits amounted to \$520. That the depositors upon receipt of said circular did submit to the proposition contained in the resolution set forth therein, to change the original character of their deposits, though the same was *not* done of their free will or advisedly, but in consequence of the penalty attached by the resolution aforesaid to a non-compliance with the law referred to therein, and that the depositors did not thereby intend or design relinquishing their character and claims as depositors, and that said resolution and by-laws were void ; that loans were made to directors and officers of the said corporation ; that said resolution and by-laws were made to conceal such loans and in fraud of the right of depositors ; that the certificates issued by such corporation bearing interest are void, and were entered into to enable said company to use banking privileges contrary to its charter, through the aid of the sums deposited ; that it did in fact erect itself into a bank, and assumed banking powers in the discounting of notes and circulation of bank paper ; that complainant never became a member of such corporation ; that said corporation is insolvent and in May, 1834, suspended payment ; that complainant is a depositor in said company and claims to be entitled to the amount of his deposit, either to the exclusion of the holders of the certificates of special deposit or in common with them, which right the said corporation denies. The bill further charged, that the institution and its directors are engaged solely in settling up its business, and disposing and distributing the funds and effects held by it, which belong to its depositors, and that settlements are continually effected by giving unjust and improper preferences ; that it is paying or intends paying as far as practicable, the whole amount of the certificates of special deposit, whereby all the funds and effects held by said insti-

tution will be exhausted to complainant's utter and irremediable injury. To the end that equity might be done in the premises by an equal and just distribution of all the funds and effects held by said institution among all its depositors. Prayer for a summons to the company, an answer to the bill, and various special interrogatories, writs of subpœna for the directors, and injunction, and for general relief.

With the bill was exhibited various documents, among others as follows:—

1. Resolution of the directors of May, 1831.

“Resolved, that the present weekly depositors of this institution terminate their deposits, as they are now received with the current month; and that they be notified that such deposits will cease to bear an interest, or be entitled to a dividend of the profits of the institution after the first day of December next, unless they are in the meantime converted into permanent stock of the institution in conformity to the following bye-laws.”

Extract from the By-laws.

Every weekly depositor desiring to make a permanent investment of his, her or their deposits, or any adequate portion of them may at his, her or their option, by subscribing an agreement to that effect in a book to be provided for that purpose, convert the same into a share or shares of stock of the par value of twenty-six dollars each, which share or shares shall be transferable on a book to be kept in the institution by the holder in person or attorney. Which stock shall vest by devise or administration on the death of the holder in the legal representative of such holder. But no such investment, nor any transfer of such stock, shall be permitted to be made by a married woman, or any person under the age of twenty-one years, nor shall any deposits after being so converted into stock, be subject to be withdrawn. And all shares of stock shall be entitled to dividends of the profits made in the institution.

2. The third and fifth sections of the by-laws referred to in complainant's bill.

Sec. 3. Any person or persons wishing to become a depositor or depositors shall apply at the institution, and having approved of the charter and by-laws shall signify his, her or their assent thereto, by signing the same, at which time each depositor or depositors shall affix to his, her or their name, the sum proposed to be deposited weekly by him, her or them, the same not being less than one dollar, and whatever sum shall be thus affixed to each name, shall be paid at the time of subscribing, and shall continue to be paid into the institution weekly thereafter, so long as the person or persons agreeing to make such deposite shall be connected with the institution.

Sec. 5. Any person or persons who shall agree to become a weekly depositor or depositors in this institution, shall deposite such sum as may be affixed to his, her or their names at the institution on Monday of each week, during such time, being not less than five hours, as the institution may be kept open for the transaction of business; and if any person or persons shall neglect, omit or refuse to make his, her or their weekly deposite, at the time required hereby, he, she or they, as the case may be, shall be fined in the sum of six and a quarter cents weekly, for each and every dollar so remaining unpaid; provided nevertheless, that nothing herein contained shall be construed to oblige any one to continue his, her or their deposits, who may have signified an intention to withdraw from the institution agreeably to the conditions hereinafter provided.

3. Notice from the directors of their design to receive certificates of special deposite in payment of debts due the institution.

4. A form of the certificates of special deposite.

On the filing of this bill and exhibits, the Chancellor, (*Bland*) on the 24th December, 1834, ordered that the application for an injunction should stand for hearing, with or without all or any of the answers, on the 14th January, 1835, provided a copy of the order and bill be served on each one of the defendants on or before the 3d January.

The Maryland Savings Institution answered the bill, and alleged that the said institution having transacted business up to May, 1831, and received from weekly depositors a large amount, and having also received on deposit from individuals at four or five per cent. interest, it was thought expedient for the security of the existing engagements of the company, that it should be proposed to said weekly depositors to waive their privilege of withdrawing, as allowed by the by-laws, their deposits, and to agree that the same should be permanently, until the expiration of its charter, retained by said corporate body and assume the form of capital stock, and be divided as such into shares for the convenience of transfer; that in pursuance of this view, the directors did pass a resolution and by-law exhibited with the bill, that the plaintiff conformably thereto, assented to continue his weekly deposit fund in the said institution, and to convert the same into the form of capital stock, and did so of his own free will and in writing, that such arrangement took place with others to amount of \$242,835, and that no restraint or coercion was used to compel it; that it was entirely optional with complainant as with other depositors to accede to it or not, and that said conversion was not planned or proposed with a view to the concealment of any fraud practised by the directors on the rights of depositors, or to exercise banking powers; that this conversion having been generally and notoriously accomplished, the directors proceeded on its basis to attract business and public confidence, and special deposits to the amount of \$229,176 50, made since that conversion; that the complainant always knew that special deposits were so taken; that increased dividends were declared and received by complainant, from eight to ten per centum. The notice No. 3, *ante*, was admitted, but the insolvency of the company in relation to creditors was denied, and it was also denied that they had received certificates of special deposit in any other way than as payment for debts due, or that they have given any improper preferences. The answer relied upon the acts and doings of the complainant

as a bar to his complaint. Various other matters of defence not strictly responsive to the bill were also stated, but which the reporters do not deem material to the question decided by this court.

The defendants exhibited with their answer the following document signed by the complainant.

“The undersigned weekly depositor in *The Maryland Savings Institution*, do hereby agree and request, that \$520 of my present deposit in the said institution may be converted to and vested permanently in twenty shares of stock of *The Maryland Savings Institution*, in my name. Given under my hand the 28th June, 1831. JOHN SCHROEDER.”

On the 27th January, 1835, the complainant with many other stockholders in said institution, filed an amended bill charging that the present board of directors thereof, or a majority of them, were elected by the former board, after the institution had suspended and was known to be insolvent, by the members thereof severally and successively resigning in order to create vacancies, which the remaining ones filled up, thus making the present board; that the present board was constituted for the sole and avowed purpose of settling up the affairs of the said institution, and not to transact the business authorized by its charter, and that the present board considered themselves trustees for the purpose of collecting and distributing the affairs of the company; that the said institution is so entirely insolvent as to be utterly unable to resume its business; that the supplemental charter of 1834, ch. 185, was never accepted by the institution, and that the complainants are therefore not members of said institution, and have done nothing to procure or accept said law. Various documents were filed with the amended answer to show the insolvent condition of the company.

The answer of the new board of directors to the amended bill re-asserted, that the change from weekly deposits to stock was made with full knowledge, freely and voluntarily by the principal part of the depositors, the receipt of increased dividends by them; that some of the former board of

directors had borrowed the funds of the institution, previously to the passage of the resolution converting deposits into stock, but that no loss can yet be traced therefrom; that such resolution was not adopted for the purpose of concealing that the company had invaded the banking privileges of other corporations; that certificates of special deposit had been issued in the forms as charged; that complainants became and were members of the institution and voted as such; that the new board of directors were appointed in good faith and upon the request of the stockholders; that the institution is not insolvent and they believe it will pay its depositors; that no new business was transacted; that the new directors have been occupied in settling its affairs, and have received the certificates of deposit in payment only; that no unjust and improper preferences have been allowed; that the complainant and others as stockholders are not entitled to a dividend of the assets of the corporation, in common with the creditors thereof; that such a principle of distribution would be unjust if not fraudulent towards creditors; various matters not material to the questions ultimately decided were also set forth in said answer, showing the condition of the accounts between the institution and *The United States Insurance Company*, and *The Susquehanna Bridge and Bank*. The exhibits with the original and amended answers were not denied.

On the 3d February, 1835, the Chancellor, (*Bland*) ordered a writ of injunction to issue, directed to *The Maryland Savings Institution*, its directors, agents and servants, commanding and enjoining it and them forthwith to surcease, give over, and refrain absolutely from paying, parting with, disbursing, releasing or remitting any money, or any of the funds which belonged to it, or were held by said institution, on or before the 6th day of May, 1834; except in so far as may be necessary to demand, sue for, get in, recover and collect, all or any of the said moneys, funds, effects, property, rights or credits, claimed by or belonging to said institution; and

safely to keep and hold the same, until the final hearing of this case or the further order of this court.

From which order the defendants prayed an appeal.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, and CHAMBERS, Judges.

D. STEWART and MAYER, for the appellant, contended :

1. That the corporation had the power to pass the resolution and by-law of May, 1831, under the third and fourth sections of their charter, which was created by the act of 1826, ch. 189, and that the conversion of the deposits into stock was a legitimate exercise of power. It was a due exercise of the power of investment, which the charter confers in the most unlimited terms.

2. This stock thus created out of the funds of the original depositors, was the security to which the special depositors looked, and it attracted a large amount to the institution. This last class of the depositors placed their funds there upon the faith of that security, and it would be a fraud upon them now to withdraw them. The conversion was made with the consent of the weekly depositors, and from that time to the failure of the bank, they have received annual dividends at the rate of from eight to ten per cent., and these dividends were swollen to that amount, by the employment of the moneys of the special depositors who could not receive more than five per cent. The appellants explicitly deny all the fraud charged in the bill, but independently of such denial there is no pretence for any such allegation. The weekly depositors had ample time given them for deliberation, and after carefully considering the subject, they all consented to the conversion, and continued, until disasters overtook the bank to receive the fruits of the change. With what show of equity therefore can they now complain or ask to be absolved from the consequence of their own act?

3. The supplement of 1833, ch. 135, was to give the privilege of voting to the new stockholders ; the appellee and

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his associates. To confer upon them the rights of stockholders, and of course the question of assenting to this modification of the charter, was submitted and assented to by the original members of the association, and these privileges were exercised by the appellee and the rest. This estops him from repudiating the character of stockholder. The contract created by the resolution of 1831, and the act of 1833, was founded upon a valuable consideration. *Little vs. O'Brien*, 9 Mass. Rep. 403. *Chester Glass Co. vs. Dewey*, 16, *ib.* 94. *Bosley vs. McKim*, 7 Har. and John. 469. According to the charter of 1826, the special depositors had no security but the bills and notes discounted by the institution. There was no banking capital; but the act of 1833, passed in pursuance of the resolution of 1831, and with the consent of the weekly depositors changed their deposits into stock, and thus placed their funds between the special depositors and loss. It was surely competent to the legislature to do this, and therefore, whatever may be thought of the resolution, its defects were healed by the act of 1833. There can be no doubt of the power of the legislature to have provided a stock capital by the original act of incorporation, before the money was subscribed; and if so, why may they not convert into stock capital previously subscribed, with the consent of the subscribers?

R. JOHNSON and CAMPBELL for the appellee.

The present injunction was granted upon bill and answer, and the unanswered allegations of the bill are to be regarded as true. This is the rule upon motions to dissolve. *Young vs. Grundy*, 6 Cranch, 51. *Warfield vs. Gambrill*, 1 Gill and John, 510. And upon such motions new matter set up in the answer is not regarded as true. *Minturn vs. Seymour*, 4 John. Ch. R. 499. Nor is the answer even when responsive to the bill entitled to full credit, it being the answer of a corporation not verified by oath. *Fulton Bank vs. New York and Sharon Canal Company*, 1 Paige, 311. The assumption of banking powers by this corporation was a

violation of the pledge of the *State*, not to increase the banking capital in *Baltimore*, which pledge was expressly saved in the charter. That charter conferred no power upon the corporators to convert deposits into permanent stock, even with the consent of the depositors, nor can such power be implied from the object and scope of the enactment. Its exercise therefore was wholly void. *Kidd on Corp.* 70. *Angel and Aimes*, 59, 60. *New York Firemen's Ins. Co. vs. Ely*, 2 *Cowen*, 709. *North River Ins. Co. vs. Lawrence*, 3 *Wend.* 483, 485. *Life and Fire Ins. Co. vs. The Mechanics' Fire Ins. Co.* 7 *Ib.* 34. 4 *Wheat.* 636. *Beatty vs. Lessee of Knowler*, 4 *Peters*, 171. The rule is, that a corporation cannot claim the benefit of a contract, either as plaintiff or defendant, unless it can show the power to make it, either in express terms, or by fair implication from the charter. And it is the same in effect, if the franchise exerted does not extend to the particular contract set up, as if there was no such franchise at all. In either case the act done is beyond the power of the corporation, and consequently void.

The third and fourth sections are relied upon, as giving the power in question; but they do not. The power given in the third, to provide for the investment of deposits, is to be taken in connection with the fourth, and means only, that they may select such public stocks or other securities as may be deemed best. If this institution has the right to convert its deposits into banking capital, there is no limit to the amount which may thus be created, for there is none to the deposits which they are authorized to receive, and thus the banking capital may be augmented to an indefinite extent, contrary to the invariable usage of the legislature, which has always been to specify and limit the amount of its capital when a bank is created.

Suppose the case of a bank with a limited capital, but without limit in the use of its credit was to take deposits, and with the consent of the depositor was to convert them into capital, would it not be unlawful? And why is not the

same thing unlawful, when done by an institution which has no authority to have capital at all?

By the fifth section, the whole profits are to be paid to the depositors. If therefore, the conversion of these deposits into stock is legal, then the owners of them are entitled to nothing, as they lose the character of depositors, and assume that of stockholders for whom no provision is made in the section providing for the distribution of the profits.

But suppose this view is erroneous, and that the depositors whose deposits have been commuted into stock, are entitled to receive the large dividends which it is alleged they have, then the object of the law which contemplates an equality of profits is clearly violated, and for that reason the act of commutation is unlawful. There can be no doubt that the charter intended, that all the depositors should participate equally in the dangers and profits of the concern. It was never designed by the legislature, to be converted into a stock-jobbing machine, liable to be prostituted to the purposes of speculation, and involved in the dangers which are inseparable from institutions which are so employed. The managers of it had no more right to pervert it to such objects, than would chancery trustees be authorized to invest funds, which the court could not at once administer. Security and moderate profits was the end aimed at in the establishment of the institution; not high gains, and the perils unavoidably consequent upon them.

2. The consent of the depositors to the conversion can make no difference. The question still is, was the franchise exerted, conferred by the legislature? If it was not, the act, whether assented to or not, is unauthorized. It is the *State* which is injured whenever a franchise is assumed, which was not granted.

Suppose this institution with the full consent of all the members had issued a fire policy, and taken a note for the premium?

Could the company have compelled the payment of the note, or the assured have recovered upon the policy in case

of loss? Neither could have been done: *Life and Fire Ins. Co. vs. The Mechanics' Fire Ins. Co.*, 7 Wend, 34. *The North River Ins. Co. vs. Lawrence*, 3 Ib. 482. These cases decide, that to condemn contracts as invalid, it is not necessary to show that they are *prohibited* in terms, provided that in the enumeration of powers in reference to the subject of contracts, other descriptions of contract are mentioned. And they further decide, that it is competent to a party who has received money under a contract to deny its validity.

It has been urged, that the parties are estopped by their consent; but the doctrine of estoppel does not apply when the *public* is concerned as is always the case, when the question is, whether a corporate franchise has been improperly exercised or not.

Even the assignee of a policy of insurance issued by a corporation without authority, cannot recover upon it, though he may have taken it without notice of the defect of power.

3. But suppose the conversion was a legal exercise of power, still the relation of debtor and creditor exists, and in the distribution of the assets of the institution no discrimination can be made between these creditors and any other class. The act of conversion did not make these deposits *capital*, and produced no other change in them, than to deprive the proprietors of the privilege of withdrawing their money at pleasure; and this was further provided for in a by-law, which would not have been the case if they were regarded as mere stockholders, because as such, the right to withdraw their money never exists. The only effect of the change, was to convert temporary into permanent deposits.

The supplement of 1833, was not accepted in the manner pointed out by the law. It was accepted within less than a month from the time of its passage, when not less than three months were required to be given. But if it was duly accepted, it does not change the character of the stock, and make it capital if it was not so before. It does not create or profess to create stockholders, who were not so before. It proceeds upon the assumption that the stock was properly created, but

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does not make valid that which was invalid at the time of the enactment.

STEPHEN, Judge, delivered the opinion of the court.

In deciding upon the question presented by the appeal to this court for adjudication, we do not deem it necessary to form or express an opinion relative to the power of the corporation under its charter to make the conversion of the appellee's deposits into stock, because we think that the decision of the court below awarding the injunction is unsustainable upon other grounds, and is in conflict with the soundest principles of equity jurisprudence. An application to a court of Chancery in a case like this, for the exercise of its prohibiting powers, or restrictive energies, must come recommended by the dictates of conscience and be sanctioned by the clearest principles of justice. We are told by *Mr. Maddox*, in his treatise on the principles and practice of the court of Chancery, in 1 vol. 104, that an injunction is a prohibitory writ, specially prayed for by a bill in which the plaintiff's title is set forth, restraining a person from committing or doing an act, (other than criminal acts) which appears to be against equity or conscience. This being the character of the writ and the grounds upon which it ordinarily issues, it becomes necessary to inquire, whether the granting of it in this case was calculated to subserve the purposes of justice, and to prevent the commission or doing of an act against the principles of equity and conscience. We think that an attentive examination of the prominent features and circumstances of this case, will leave but little doubt as to the conclusion proper to be drawn as the result of such an inquiry. So far from the complainant having a right to the relief which he asked at the hands of the court of Chancery, we think that there is not any ground of equity in his case, and that his conscience is bound by an equitable estoppel, if not from questioning the right of the corporation to make the conversion of his weekly deposits into capital stock, as a fund for the payment of its debts, at least it is so bound

from making any attempt, to shield the fund so created from a liability to the payment of debts contracted with the institution upon the faith of its responsibility; and more especially as it clearly appears, his interest has been essentially promoted in the shape of dividends by the credit attracted to the institution, in consequence of such conversion. It would not certainly comport with the principles of equity and fair dealing, to permit the appellee to hold out false colours to the world, and by attracting the public confidence to the institution, to realize to himself large profits in the form of dividends on his stock, pledged as a security to the creditors of the corporation, and then to call in aid the powers of a court of equity to protect his interest in said stock from a liability, to which he had voluntarily subjected it, and by which liability he and his associates had been essentially benefitted. We say *voluntarily* subjected it, because the allegations of the bill to the contrary, are in this respect flatly and pointedly contradicted by the answer. It must be borne in mind, that the order for an injunction from which this appeal has been taken, was granted by the Chancellor, not upon the case alone as made by the bill, but upon the bill and answer as well of the corporation or body politic under its corporate seal, as of the president and directors in their private and individual capacities under oath. If therefore the injunction is to be sustained, it must be upon the case as made by the bill and answer, and not by the bill alone. The object of the injunction appears to have been, and its effect and operation, are to prevent the officers of the corporation from paying the special depositors, or receiving their certificates of deposits in payment of debts due to the institution. How far it is warranted by the principles of equity and conscience in such its operation upon their rights and interest, it is the duty of this court now to examine and declare, and we think that in a court of conscience at least, but little doubt can be entertained upon the subject. It is an unyielding and inflexible principle of the court of Chancery, that he who seeks equity ought to be prepared to do equity. Before therefore, the

complainant can enlist the countenance of a court of equity in his favour, he must be prepared to render to these depositors, that full measure of justice which the principles of equity and conscience demand at his hand. Does his standing before this court, and the relief which he prays in his bill exhibit him in that character and attitude? We think it does not, and that the injunction which issued in this case ought not to have been granted. Numerous cases analogous in point of principle to the one now before this court, may be extracted from the books of equity decisions. They are all decided upon the ground of fraud and imposition, and are intended to uphold and enforce the principles of good faith and fair dealing in the transactions and intercourse of man with man. A striking and impressive illustration of this doctrine of the court of equity upon such subjects, may be found in 2 *Atk.* 72, where *Lord Hardwick*, that great luminary of the court of Chancery says, there are several instances where a man has suffered another to go on with building upon his ground, and not set up a right till afterwards, when he was all the time conusant of his rights, and the person building had no notice of the other's rights, from which the court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance. Speaking of the same rule of equity, Chancellor *Kent*, in 6 *John. Ch. R.* 168, says, where one having title acquiesces knowingly and freely in the disposition of his property for a valuable consideration by a person pretending to title, and having colour of title he shall be bound by that disposition of the property, and especially if he encouraged the parties to deal with each other in such sale and purchase. It is deemed an act of fraud for a party conusant all the time of his own right to suffer another party ignorant of that right to go on under that ignorance, and purchase the property or expend money in making improvements upon it.

In 1 *John. Ch. R.* 354, Chancellor *Kent*, speaking upon the same subject says, there is no principle better established in this court, nor one founded on more solid considerations

of equity and public utility, than that which declares, that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such persons. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.

We think that the principle established by these decisions has a considerable bearing upon the merits of this case. The appellee after having consented that his deposits should be converted into stock, as a fund or security for the debts of the institution, and after having encouraged their special depositors to deal with the institution upon the faith of such responsibility, now endeavours to withdraw the fund from the pledge and liability to which he had voluntarily subjected it; and claims to stand in a court of equity upon an equal footing with them in the teeth of such, his solemn engagement to the contrary. We think in the language of the authority just referred to, that it would be an act of fraud and injustice in him; that his conscience is bound by an equitable estoppel. Whether the corporation had a right to make the conversion against his will and consent, under the powers derived from their charter, it is not necessary now to decide; nor do the merits of this controversy depend upon the solution of that question. The agreement to convert is to be received as a contract with each depositor, who trusted his money to the corporation upon the faith of it, that his stock should be liable to such depositor as a fund for the payment and satisfaction of his claim. To such purpose the stock of the appellee must be considered as voluntarily dedicated by him; and it would we think, be repugnant to the soundest principles of equity and justice to sanction the attempt which is now made, to wrest it from the destination and purpose for which it stands pledged by his own solemn engagement, and thereby inflict a most serious injury upon those whose only fault has been a misplaced confidence in the sincerity and inviolability

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of his promises and professions. To such an attempt, we think that a court of Chancery in the exercise of its equity powers ought to lend no assistance ; and that such a suitor should be turned from its doors to seek redress any where, rather than in a court of conscience. Why is it that a court of equity decrees the specific execution of a parol agreement on the ground of part performance, and notwithstanding the express provisions of the statute. It is on the ground of fraud in refusing to perform after performance by the other party, and to prevent the statute from being an engine of that fraud, which it was the object and policy of its enactment to prevent. Upon the whole we are clearly of opinion, that whether the corporation had the right to convert the weekly deposits into capital stock or not, still we think that the injunction under the circumstances of this case should not have been granted, and that the order granting the same ought to be reversed. We consider the fund arising from this conversion of the weekly deposits into stock by the depositors with their own consent, to be in the hands of the corporation as trustees for the special depositors as creditors of the institution, they having become such upon the faith of it, and that a court of equity ought not to interpose to withdraw it from the destination to which it has been thus solemnly pledged.

ORDER REVERSED.

Clarke vs. State use Darnall.—1836.

B. H. CLARKE vs. THE STATE use of DARNALL, GUARDIAN
of HALL.—December, 1836.

By the act of 1798, ch. 101, sub. ch. 14, sec. 4, a person appointed guardian to a minor by the Orphans' court, is not qualified to act as such, until he has bonded, and such qualification can only be established by the adduction of the bond, or office copy thereof, unless it has been lost and the record destroyed, when proof of an inferior character might perhaps be admissible. The bond itself, or an office copy is the best evidence, and must be shown to be lost or destroyed before inferior proof can be resorted to.

Where by the pleadings the issue was, whether the guardian had collected and received certain moneys claimed for his ward, evidence proposed to be offered by the defendant to establish the fact that the guardian had discharged himself, by the payment of the amount proved to be in his hands to a successor legally qualified to act, was held to be foreign to the issue, and therefore inadmissible.

Evidence of a variety of facts and circumstances offered by the plaintiff, to repel the proof which the defendant proposed to adduce, was also held to be inadmissible as foreign to the issue, and the county court erred in admitting it; but as such proof could not have influenced the minds of the jury in finding upon the issue submitted to them, this court would not for such error reverse the judgment, the plaintiff in whose favour the verdict was rendered having offered uncontroverted evidence in support of the issue on his part.

APPEAL from *Prince George's* county court.

This was an action of *debt*, commenced on the 11th March, 1834, against *Benjamin H. Clarke*, on the bond of *Richard Hall*, to the *State*, conditioned to perform the duties of guardian to *Henrietta Hall*. In this bond *Francis M. Hall* and *Benjamin H. Clarke*, the appellant, were sureties. The bond was dated 13th June, 1820. The defendant pleaded performance generally by the guardian. The plaintiff replied, that *Richard Hall* as guardian, collected moneys of his ward; that afterwards his guardianship had been revoked; that the said *Darnall*, had been appointed guardian to *Henrietta*, who is still a minor, and in that character entitled to receive the sums in the hands of the said *Richard*, which he upon request had refused to pay. The rejoinder alleged, that the said *Richard* did not collect and receive for the use of the said ward the sums mentioned in the replication, &c. on which issue was joined.

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At the trial of the cause the plaintiff read in evidence a copy of the aforesaid guardian's bond duly certified, and then produced and read in evidence for the purpose of showing that the plaintiff was entitled to maintain this action, a certificate under seal from the register of wills of *Anne Arundel* county, stating that the plaintiff, *Darnall*, was on the 14th January, 1834, appointed the guardian of the said *Henrietta M. Hall*, and as such had given bond with sufficient security; and also read in evidence an account with the Orphans' court of *Prince George's* county, passed the 5th May, 1825, by the said *Richard Hall*, as guardian aforesaid for the purpose of charging the defendant with the sum due the minor upon said account.

The defendant for the purpose of sustaining the issue on his part, offered in evidence to the jury a *second* account of the said *Richard* as guardian, dated the 8th August, 1826, showing a balance due the minor of \$1,150, having charged himself with interest on the balance of the first account, and received a credit for boarding and clothing the minor and fees paid \$125, and then proved the order of the Orphans' court revoking his appointment and appointing a certain *Francis M. Hall*, guardian in his stead. And the defendant then for the purpose of showing that the said *Richard Hall*, had paid over into the hands of the said *Francis M. Hall*, as guardian as aforesaid, the whole amount of the said ward's estate, offered in evidence the account of *Francis M. Hall*, as guardian of the said *Henrietta M. Hall*, rendered on the 13th March, 1827, by *Charles Hill* executor of said *Francis M. Hall*, charging the said *Francis* with the above balance of \$1,150, and claiming a credit of \$77 75, for tuition and register's fees paid for the ward, which account was also passed on the day and year last aforesaid. The defendant further proved by *W. D. Clagett*, a legal and competent witness, that shortly before the death of the said *Francis M. Hall*, he, the said *Hall*, requested the witness to go to the *Georgetown Academy* and make a contract with the teachers of said school for the board and tuition of the said minor, and

that in pursuance thereof the said witness did go, and the said minor was placed there at school by the said *Francis M. Hall*, in his life time, and remained there at the time of his death, and was there continued by the executors of the said *Hall*. The defendant further proved, that a number of valuable negroes were placed in the hands of the said *Francis M. Hall*, by the said *Richard Hall*, to indemnify him and the defendant, *Clarke*, as his sureties upon the bond aforesaid; that said negroes were retained by the said *Francis M. Hall*, until the time of his death, and the hire of the same received by him, and that various disbursements were made by him to the said minor, prior to the time of his death.

The defendant's counsel then prayed the court to instruct the jury, that the said orders and the accounts aforesaid so as aforesaid passed by the executor of said *Francis M. Hall*, before the Orphans' court of *Prince George's* county were evidence that said *Hall* had qualified as the guardian of the said minor, and given bond as such, and that the said *Richard Hall* had paid over to the said *Francis M. Hall*, in the character of guardian aforesaid, every dollar due from him to his said ward, and that if they should so find they must render a verdict for the defendant.

But the court refused to grant the instruction, and directed the jury that the orders and accounts offered in evidence by the defendant were no proof of that fact. And upon the prayer of the plaintiff's counsel the court further directed the jury, that for the purpose of finding that *Francis M. Hall* ever was the guardian of *Henrietta M. Hall*, they must be satisfied by the proof, that the said *Hall* was not only appointed by the Orphans' court of *Prince George's* county as her guardian, and accepted said appointment, but they must also find, that in pursuance of said appointment the said *Hall* gave bond as required by law; and that for this purpose the said accounts passed by the executors of said *Hall*, is not competent and admissible proof; and that the acts and declarations of said *Hall*, are not admissible to prove such guardianship, unless the jury are satisfied from

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other testimony that he bonded as required by law. *The defendant excepted.*

The plaintiff then proved by *John Brooks*, who has been chief judge of the Orphans' court of *Prince George's* county from before 8th August, 1826, until the present time, that he never knew *Francis M. Hall* to have bonded as guardian of said *Henrietta M. Hall*; that he always understood said *Francis* had not given bond; and the witness further stated, that he did not speak from any knowledge of his own on the subject; but only from what he understood from others. The plaintiff further proved by *Leonard H. Chew*, that he is chief clerk and acting register of wills in the register's office in *Prince George's* county, and has been since the year 1830; that he has frequently at the request of said *Darnall*, the plaintiff and *Charles Hill*, searched the records of his office, and the files of original papers therein, and has not been able to find any original bond or record of bond, by the said *Francis M. Hall* as guardian of said *Henrietta M. Hall*; and also proved by *Edward W. Belt*, that he was chief clerk and acting register in the register's office of *Prince George's* county, at the time of the revocation of *Richard Hall's* appointment as guardian of said *Henrietta*, and also when the said account was exhibited by the said executors of *Francis M. Hall*, and passed by the court, and that said account was stated by him at the request of said executors, or one of them, and that to the best of his knowledge and belief; *Francis M. Hall* had not at that time given bond as guardian aforesaid, and that he never saw any such bond, and that he always understood that *Francis M. Hall* never did give bond as guardian; and further, that when said account was offered for passage a difficulty arose from the circumstance, that no such bond could be found; and that although it is possible that the said *Francis M. Hall* may have bonded as such guardian, without his knowing it, it is not very probable. To the admissibility of all said proof for the purpose aforesaid on the part of the plaintiff, the defendant by his counsel also objected, but the court overruled the objec-

tion, and suffered the proof to go to the jury as *prima facie* evidence, that in point of fact, no such guardian's bond had been executed by *Francis M. Hall*, as the guardian aforesaid.

The defendant excepted.

The plaintiff then offered to prove by *Charles Hill*, that he had heard his testator, *Francis M. Hall*, say, that he had never given bond as guardian aforesaid; and that he, the witness himself, had passed the foregoing accounts without having received the money therein stated to have been received by him; but the defendant by his counsel objected to the competency of said *Charles Hill*, as a witness on the ground, that the effect of his testimony was to relieve the estate of his testator from the payment of more than one-half of the plaintiff's claim if recovered, inasmuch as he would be entitled to contribution from the defendant as co-security with his testator, and if he, the witness, as executor aforesaid paid the amount recovered against him as executor, (it appearing in proof that a suit was also pending against the said witness upon the same bond as executor aforesaid, at suit of said plaintiff,) he would be entitled to an assignment of the judgment against defendant in the present action; but the court was of opinion, that the said *Charles Hill* was a competent witness in the present action and permitted his testimony to go to the jury. *The defendant excepted.*

The verdict and judgment being for the plaintiffs, the said *B. H. Clarke* applied to this court.

The cause was tried before BUCHANAN, Ch. J. and ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

THOMAS F. BOWIE, for the appellant, contended:

The first error was in the court's refusing to instruct the jury, that the evidence offered by the defendant was sufficient to enable them to find, that bond had been given. In similar cases courts have authorized a jury to presume a bond. They make presumptions in favour of trustees, and the due discharge of duties to be performed under public authority, and in favour of the existence of a legal power, as

that the Orphans' court acted correctly. *Shilknecht, et al. lessee vs. Eastburn*, 2 Gill and John. 115. It was the duty of the Orphans' court to have required, and Hall's duty to have given a bond as guardian, and the county court should have so far presumed in favour of its execution, as to throw the burthen of proof of a contrary proposition upon the plaintiff below. *Fridge vs. State use Kirk*, 3 Gill and John. 113. As instances in which a presumption of rightful performance of duty had been assumed, he cited: *Clarke vs. Magruder, et al*, 2 Har. and John. '77. *Ferguson vs. Tucker*, 2 Har. and Gill, 183. 3 Camp. 432. The act of Assembly declares that a guardian shall not act until he has given bond. And here Hall has acted as guardian, dealt with the ward's estate; rendered accounts as guardian; has allowances made to him in that character. These circumstances will enable a jury to infer the execution of the bond. It was legally sufficient for that deduction. The error was in assuming that nothing short of the production of the bond itself would suffice and cutting off the defendant from the inference before insisted upon.

Another error below, was in admitting the evidence of the judges and clerks of the Orphans' court. This was all hearsay, and could not *prima facie* prove any thing; but if this evidence was right on the part of the plaintiff, evidence of a similar character was competent on the part of the defendant.

By receiving the evidence of *Charles Hill*, the court permitted him to contradict his oath, that he had received the money mentioned in his account settled with the Orphans' court. Besides the action was brought upon a bond on which the testator of the witness *Hill* was a co-security. If *Clarke*, the defendant, had to pay, the witness as executor of *Hall* would be liable for contribution. There is a privity between a testator and his executor, and this disqualified the witness on the score of interest. One co-security cannot be a witness for another. *Albers vs. Wilkinson*, 6 Gill and John. 358, 360. *Wilmer vs. Harris*, 5 Har. and John. 9. 1 *Anstruther*, 299. 8 East. 539.

TUCK, for the appellee.

The defence made below was, that the first guardian was removed by the Orphans' court, and that *Francis M. Hall* was thereupon appointed, and received the funds from the first guardian, and so discharged the bond now in suit. We deny that his appointment as second guardian was ever completed; we deny that he gave bond and received the ward's estate. The act of 1798, ch. 101, sub ch. 12, sec. 3 and 5, show that a bond is necessary to complete the title as guardian. There is no evidence that *Francis M. Hall* ever did any act as guardian; nor was there any action of the Orphans' court assuming him to be guardian. There is therefore nothing in the evidence to divest the interest of the minors in the bond of *Richard Hall*.

The act of 1827, ch. 210, directs, that the executors of guardians shall pass accounts of estates committed to their testators, and hence the account passed in this cause; it was not the act of the guardian, and lays no foundation for a presumption of that species of authority in *Francis M. Hall*. The cases of presumption cited by the appellant's counsel are not denied, but where the court has no jurisdiction, they do not apply. All the officers of the Orphans' court prove that no bond had been executed, and that the court had no jurisdiction. The judges knew the bond was not there, and the court therefore could not divest the ward's claim on *Richard Hall's* bond. If therefore the court had no power to account with *Hill*, that account rendered in fact, was void in law, and properly rejected. *Per se*, it could not show that *Francis M. Hall* was guardian. The evidence of *Clagett*, accounts for *Francis Hall's* apparent interference in the minor's estate. The negroes were delivered to indemnify him upon *Richard's* bond, and not as guardian, and could raise no such presumption. 1 *Serg. and Raw.* 407. *Charles Hill* was a competent witness. The interest to disqualify must be immediate in the result of the cause. 2 *Stark. Ev.* 744, or in the record of the cause as evidence; it must not be uncertain or contingent. 1 *Phil. Ev.* 38. A witness should not be excluded

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on the score of interest, unless it appears; but *Hill* was not interested here. 1 *Serg. and Raw.* 36. *Hard.* 117. It is true he had a suit depending, and no doubt the estate of his testator was responsible. Yet this is not the case where the witness by his evidence fixes a responsibility of his own upon another, in which case he is incompetent. Again, if the testator, *Francis M. Hall*, was alive he would be competent to fix *Clarke's* liability on the bond, *Hall* being responsible for one-half. The record could not be evidence against *Hill* under any circumstances, and he was indifferent between the parties here. The plaintiff could recover against him as executor, either upon the first bond or upon the guardianship of *Hall*, if he was guardian, and the fact of a suit depending against *Hill* makes no difference. Again, *Hill* was a competent witness because he was executor. 1 *Wm. Black*, 365. 1 *Doug.* 139. 5 *Halst'd*, 297. *Mockbee vs. Gardiner*, 2 *Har. and Gill*, 176. But none of the evidence was pertinent to the issue joined in the cause. The only question open on the record is, whether *Richard Hall* had received the plaintiff's money. There is no plea of payment in the cause, and the court properly refused the rejected evidence.

RANDALL, on the same side further contended :

That the acts offered in evidence were those of *third* persons, to discharge a minor's claim. The liability upon this bond had once attached, and as a general rule the evidence ought to be very clear to shift it. There must be a fixed responsibility some where to discharge the known liability of the first guardian and his sureties; and here it turns upon the question, whether the second guardian was properly appointed, and his authority perfected; for it is upon the latter position only that his acts are evidence. *Mercer vs. Walmsby*, 5 *Har. and John.* 33. *Davis vs. Davis, et al*, 7 *Ib.* 36. *Cockey vs. Smith*, 3 *Ib.* 28. *Hammond vs. Ridgely*, 5 *Ib.* 264. *Carroll vs. Norwood*, *Ib.* 157. *Clerklee vs. Mundell*, 4 *Har. and John.* 497. *Fishwick vs. Sewell*, 4 *Ib.* 403. In all cases of presumed legal acts, there is a preliminary ques-

tion for the court, the sufficiency of the evidence to enable the jury to make the deduction.

Upon the competency of *Hill* as a witness, he cited, *Stimmel vs. Underwood*, 3 *Gill and John*. 287. *Watts vs. Garrett*, 3 *Ib.* 355. *Callis vs. Tolson's Ex'rs.* 6 *Ib.* 91. *Roscoe on Ev.* 85, 1 *Phil. Ev.* 42. Again, the defendants were not injured by the opinions of the county court, either in rejecting or permitting the evidence to go to the jury. The opinions therefore of that court cannot be ground for reversal. *Sothoron vs. Weems*, 3 *Gill and John*. 439. *Naylor vs. Semmes*, 4 *Ib.* 274. *Bosley vs. Chesapeake Ins. Co.* 3 *Ib.* 472. *Maryland Ins. Co. vs. Bathurst*, 5 *Ib.* 159. When a defendant takes issue upon one point, and a verdict is rendered against him, the court will not presume he has another issue. The evidence offered on this trial was not pertinent to the issue; and the admission or rejection of it could not prejudice the defendant. And as the act of 1827, was passed after the rendition of the account by *Hall's* executor, and as such accounts were not before that time required, it cannot be regarded as evidence for any purpose in the cause.

CAUSIN, for the appellants in repl

The argument of the first bill of exceptions assume, that the existence of a bond, may be inferred from other facts, save the production of the bond itself.

It is evident that if a bond had been given, it would have been a good defence for *Clarke* in this action, although it might have been subsequently lost. In support of our assumption of the existence of the bond, as inferential from the facts adduced in evidence, we have cited: *Fridge vs. The State use of Kirk*, 3 *Gill and John*. 113. *Shilknecht, et al, lessee vs. Eastburn's heirs*, 2 *Gill and John*. 115. *Clarke vs. Magruder*, 2 *Har. and John*. 77. *Ferguson vs. Tucker*, 2 *Har. and Gill*, 183. *Rex vs. Verelst*, 3 *Camp.* 432. *Rex vs. Jones*, 2 *Camp.* 131. *Butler vs. Allmeet*, 1 *Stin.* 22.

Rodwell vs. Redge, 1 Car. and Payne, 220. From these authorities it is assumed :

1. That every rational presumption is to be made in favour of the acts of judicial tribunals in the exercise of a legitimate jurisdiction.

2. This presumption is a rule of law as applied to them, and constitutes of itself, a case of *prima facie* evidence, which needs no support by the actual production of testimony in its favour, unless to rebut proof offered to destroy this presumption.

3. That when it is necessary to produce evidence in support of the propriety of action by judicial tribunals, every favour should be extended by the court, and the evidence should not be withheld from the jury, except it is so vague and inconclusive as to create no rational inference ; or when if admitted, it would be wholly inapplicable to the case of the party, by whom it is offered. *Brickly vs. Culdwell*, 1 Har. and Gill. 107. *Davis vs. Barney*, 2 Gill and John. 404. *Sothoron vs. Weems*, 3 Gill and John. 435.

4. That it is not essential that the court should agree with the jury in the inference to be drawn, and if the evidence is not excluded by the rule laid down in *Brickly vs. Caldwell*, it should be submitted to the jury ; although their conclusions from it, might differ from those of the court. *Ferguson vs. Tucker*, before cited. 1 Stark, new ed. 677.

The counsel here proceeded to apply the foregoing principles to the cause under consideration, and contended :

That the court erred in their instruction, and that unless this court could charge the Orphans' court with judicial negligence, or ignorance, or reverse the legal maxims, as applied to such tribunals ; they could not sustain the opinion of the court below.

What were the facts ? they treated with him as guardian ; they recognized his right to the control of the property of the ward by allowing the disbursements.

Under what circumstances could they do this ? Have they the discretion to repose this authority with any one they may

select? And to determine what security they will require for the faithful performance of the trust. The law is explicit—their powers are limited—they can act but on certain conditions—and what are they? that the party shall give bond before he can act as guardian, or they recognize him as such. But they did recognize him as guardian—they did exercise this power, which to be legal, must be preceded by the giving of a bond. What then apart from the rule assumed in the second position is the inference? Are you to presume the act of the court was wrongful? that they erred from ignorance, or were guilty of *official* malfeasance and moral turpitude? for it would be an act of moral turpitude for the Orphans' court, overstepping the security the law has thrown around the interest of minors, for whose benefit the tribunal was instituted; for whom they are to act in *loco parentis*, to expose their only subsistence, to unsecured fidelity, which the law will not assume of any one. The arguments on the other side would have you to assume, not only that they acted without authority, but against the express provisions of the law, by which they derive their power over the estates of minors. A doctrine not founded in reason, and opposed to the whole spirit and principle of the law. It is an assumption of guilt in the man, and negligence or ignorance in the officer.

I have argued this case and cited authorities to show that the presumptions which the plaintiff wished to be inferred from the proof offered, was such as necessarily resulted from it, but this is not necessary—it is sufficient for me to shew, that the presumption might in the exercise of a reasonable discretion by the jury have been drawn, even although, the court below or your honours would conclude differently. *Ferguson and Tucker*, 2 Har. and Gill, 183. And what is the objection to this evidence? Why it seems to me to be founded in the supposed impossibility of the loss of a bond from the office where it should have been kept.

The court say we must offer other proof—it is easy to require additional evidence, but it would have puzzled us to

prove it. Suppose the bond had been given and lost, what other evidence is it probable we would have adduced? The principal is dead, his evidence as witness for the plaintiff, gone; think you the securities, would likely have volunteered their testimony? In short, it seems that the court below assumed, that it is more improbable that the bond could have been lost, than that the Orphans' court should have acted improperly.

Further the court say, that the acts and declarations of *F. M. Hall* are no proof of the fact of guardianship, and for this reason they reject the testimony of *Mrs. Hall* and *W. D. Clagett*, to support the cause of the defendant, but yet this principle seems not to have been recognized by them in a subsequent period of the case. The declarations of this same *Hall* are admitted to prove he never did qualify as guardian; that is, his declarations when they tend to his prejudice are not to be received, but when they operate in his favour they are fully competent.

It is difficult to reconcile the opinion of the court upon this testimony, with the rejection by them of that offered in support of the presumption of the existence of a bond.

Admitting that the evidence is liable to no other objection, where is the propriety of permitting it to go to the jury, to establish a presumptive negative, when in the same breath the court insist, that the positive affirmation must be established by the defendant.

The evidence at best is inconclusive and inferential, not proof of facts but basis of presumptions, and in the equal distribution of justice we cannot perceive a sanction for its admission in favour of one party, while it is rejected when offered by the other. But besides, it is *hearsay* and therefore inadmissible, as well as that part of *Hill's* testimony, which presents the declarations of his testator.

Evidence of declarations is admissible in but two cases:

When the witness is indifferent between the parties, *Roscoe*, 23, or when it tends to the disadvantage of the party making them.

This contingency does not arise here; in the first place, as

to *Brooks'* testimony, we cannot know from whom he derived the information he delivers, and the declarations must appear affirmatively to have been made by a party not interested in the issue; and as to *Hill's*, the very effect of the declaration was to relieve his testator as guardian, and himself as executor from all liability to *H. M. Hall*, or the plaintiff in this action.

There are estoppels of record by parties to them; but the objection goes to *Hill's* power to deny his own record act, and as we contend the principle is the same in both cases. Suppose *Darnall* had sued *Hill* as executor of *F. M. Hall*, as guardian to *H. M. Hall*, would not this account have been conclusive evidence against him, and could he in a court of law be permitted to deny its verity? *Comyn on Est.* 197. *High vs. Whiting*, 4 *Mass. Rep.* 625. *Evans vs. Iglehart*, 6 *Gill and John.* 171.

The effect of *Hill's* testimony is to place a bar to any recovery against him by the plaintiff, as executor of *Hall's* charging him as guardian to *H. M. Hall*; because the judgment against *Hall*, the first guardian, upon the matter stated in the record, that he had not paid over his ward's estate, would preclude *Darnall* from suing *Hill* as executor of *Hall*, because in that case he would have to allege what in the former he had denied, to wit: that *R. Hall* had paid over the property to *F. M. Hall*. *Roscoe*, 82. 7 *T. Rep.* 62. 1 *Bingham*, 260. 4 *Bingh.* 649.

Hall is also interested to fix the liability on *Clarke*, as security of *R. Hall*, and in proving *R. Hall* the proper object of the plaintiff's suit on these grounds.

1. If *R. Hall* is not liable *F. M. Hall* his testator is; and should the plaintiff fail in proving *R. Hall's* liability, then the defendant would not be at all responsible, and he as executor of *F. M. Hall*, would have to answer the whole claim: whereas if judgment be recovered against *Clarke*, he would merely have to contribute as security. *Albers and Wilkinson*, 6 *Gill and John.* 558. *Roscoe*, 88, citing. 4 *Taun*, 752.

2. That although in the event of a suit against him, he as

executor would not be personally answerable for the judgment; he would be for the costs.

3. That as long as the claim can be supposed available against the securites of *R. Hall*, he as executor is entitled to retain the negroes assigned as collateral security—to collect their wages, and to receive a commission upon the increased fund so brought into the estate—at least this would be assets to the extent of his testator's interest. Whereas, if *Clarke* is not responsible, and *F. M. Hall* is really liable, on account of the guardianship, he as executor would have to account for all the rents and profits received, and deliver up the negroes, without being entitled to charge them as assets or receive commission on them.

ARCHER, Judge, delivered the opinion of the court.

The defendant having offered the proof set out in the bill of exception, himself raises the question, as to competency of the orders of the Orphans' court, and the accounts passed by the executors of *Francis M. Hall*, as evidence, that *Francis M. Hall* has qualified as guardian of the minor, and had given bond as such, that *Richard Hall* had paid over to *Francis M. Hall* as guardian all the moneys in his hands belonging to the ward.

The court decided they were no proof of that fact; and in this opinion we think the court were right.

By the act of 1798, ch. 101, sub ch. 14, sec. 4, no person although appointed as guardian, is qualified to act as such, until he has bonded; and this the prayer would seem to concede; and such qualification could only be established by the adduction of the bond, or an office copy thereof, unless indeed the bond had been lost, or the record thereof was destroyed or lost, when proof of an inferior character might perhaps be admissible. But no attempt has been made to let in such inferior proof by the adduction of any evidence of such loss or destruction. Until this at all events was done, it is perfectly clear, that such proof was not competent, because not the best proof the nature of the case affords. The acts and

Robey vs. Turner.—1836.

declarations of *Francis M. Hall*, under the circumstances, would be clearly incompetent to prove such guardianship. All this evidence offered on the part of the defendant, was inadmissible upon another ground. The rejoinder had placed the issue entirely on the collection and receipt by *Richard Hall* of the money claimed as guardian for his ward; and all the foregoing evidence, intended to establish the fact of his having discharged himself of liability by the payment of the sum proved to be in his hands, to a successor legally qualified to act, was foreign to the issue, and was therefore inadmissible proof.

Without advertng to other objections urged against the evidence offered by the plaintiff, which appears in the same bill of exceptions, it will be sufficient to say that it was entirely inadmissible, because having no relevancy to the issue, which was before the jury, the court ought in our opinion to have rejected this evidence, and in this respect, we think the court erred.

But for this error, we do not think the judgment ought to be reversed, as the evidence could by no possibility have had an influence upon the minds of the jury, it being entirely irrelevant to the issue; the plaintiff had offered uncontroverted evidence to the jury of the truth of the issue; and all the efforts of the defendant to introduce irrelevant testimony bottomed on the hypothesis of the receipt of the money by *Richard Hall*, had of course assumed the proof of the issue on the part of the plaintiff.

JUDGMENT AFFIRMED.

THE STATE, for the use of TOWNLEY ROBEY vs. EDWARD TURNER, *et al.*—December, 1836.

As soon as a writ of *fieri facias* is delivered to a sheriff, in contemplation of law, it attaches itself to the bond, which gives him authority to act as such for the time being, and if a default is committed upon such writ, the party injured must sue that bond.

Robey vs. Turner.—1836.

Two writs of *fiery facias*, at suit of the same party, were placed in the hands of the sheriff on the 24th of November, 1828, and laid, the one on the 6th of December, of the same year, the other, on the 21st of January, following. On the 17th of May, 1830, the sheriff levied upon these writs the sum of \$1,100, which he made default in not paying over, and the party entitled, thereupon, brought suit upon his bond executed on the 8th of December, 1829. *Held*, that the right to recover was not upon the bond sued on; but that the remedy of the party was upon that bond, which clothed the sheriff with official authority at the time the writs were placed in his hands.

The giving of costs is not a valid objection to a judgment against the *State*; but if it were, this court will regard it as a clerical error, and permit the party here, in whose favour it was rendered, to correct the error according to the provisions of the act of 1809, ch. 153, sec. 2.

APPEAL from *Charles* county court.

This was an action of *debt* instituted by the appellant on the 5th of March, 1832, against one *Jesse C. Cook*, who died whilst the suit was depending, and the appellees his sureties in his bond as sheriff of *Charles* county, dated on the 8th of December, 1829, in the penalty of £10,000, and with the usual condition.

The appellees pleaded performance of the condition by *Cook*, to which the appellant in his amended replication replied as follows—"And the said state by, &c. for plea the said state by its said attorneys by replying, saith, that at a county court begun and held at *Port Tobacco* in and for *Charles* county, on the third Monday in August, in the year 1828, before the Hon. *John Stephen*, chief judge, and others his associates then judges of said court, the said *Townley Robey* in the endorsement of the original writ in this cause impetrated, and at whose instance and for whose use this suit is brought, by the consideration of the same court, did recover against a certain *Nathan S. Dent*, and also against *Nathan S. Dent*, and *Alexander Dent* executors of a certain *William Dent* late of said county as well the sum of eleven hundred dollars current money with interest from the 16th day of January 1823, and the quantity of 389 lbs. of tobacco, with interest from the 3d of July, 1814, until paid, debts, and costs eight dollars and eighty-five cents, and \$8,88½ cents, whereof the said *Nathan S.* and *Nathan S.* and *Alexander* as executors aforesaid were convict, as by record and process thereof in said county

court here of record remaining, appears, and which same judgments in form aforesaid had and obtained, was for a just debt due to the said *Townley Robey* by the said *Nathan S. Dent*, and *Nathan S. Dent*, and *Alexander Dent*, executors of *William Dent* and then not paid, or in any manner satisfied. And the aforesaid state by its said attorneys further saith, that after the rendering the judgments aforesaid, and before the issuing the writ of the said *State* against the said defendants in this cause, to wit: on the 24th day of November in the year 1828, the said *Townley Robey* for the recovery of the debt, damages, costs and charges aforesaid, prosecuted out of the county court aforesaid here, two certain writs of the *State of Maryland* of *fieri facias* to the sheriff of *Charles* county aforesaid directed, by which said writs the said sheriff was commanded, that of the goods and chattels, lands, and tenements of the said *Nathan S. Dent*, and the goods and chattels of the said *William Dent*, in the hands of the said executors *Nathan S.* and *Alexander* to be administered, if so much thereof he had, and if not, of the goods and chattels of the said *Nathan S.* and *Alexander* in his bailiwick being, he should cause to be made the said debt, costs and charges aforesaid, and that he should, have the same before the said County court, here on the third Monday in March, then next following, to render the said *Townley* the debt, damages, costs, and charges aforesaid, and which said writs of *fieri facias* afterwards, and before the return thereof, were delivered to the said *Jesse C. Cook*, he the said *Jesse C. Cook*, then being the sheriff of the said County, in due form of law to be executed, and were laid by him on the land, on 6th December, 1828, and on the goods and chattels on the 21st January, 1829, by virtue whereof the said sheriff afterwards, and before the return of the said writs, in his bailiwick, to wit: on the 17th day of May, 1830, at *Charles* county aforesaid, levied of the goods and chattels, lands and tenements of the said *Nathan S. Dent*, and *Nathan S. Dent* and *Alexander Dent*, executors of *William Dent*, so as aforesaid taken the sum of eleven hundred dollars, current money, with interest

and costs, and additional costs aforesaid, and also the quantity of 389 lbs. of tobacco, with the interest and costs aforesaid. Nevertheless the said *Jesse C. Cook*, the said sums of money, and costs, and tobacco so as aforesaid levied by him by virtue of the said writs of *fieri facias*, before the said county court here, had not at the return of the said writs to render to him, the said *Townley Robey* or to the said *Nicholas Stonestreet*, nor hath he, the said *Jesse C. Cook* paid the same, or any part thereof either to the said *Townley Robey* or the said *Nicholas Stonestreet*, although often thereunto required, and so the said *State* by its said attorneys saith, that the said *Jesse C. Cook* has not well and faithfully fulfilled and performed the duties of the office of sheriff of the said county of *Charles*, which according to the form and effect of the said condition of the writing obligatory aforesaid he ought to have done, and this the said *State* by its said attorney are ready to verify, &c. Wherefore the said *State* by its said attorneys prays judgment, and its debt aforesaid, together with the damages for the detention thereof, to the said *State* to be adjudged, &c.”

The defendants filed a general demurrer to the above replication, in which the plaintiff joined. The county court gave judgment on the demurrer for the defendants, and the plaintiffs appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and ARCHER, DORSEY, CHAMBERS and SPENCE, Judges.

J. JOHNSON for the appellant contended :

1. That although the bond on which the action was brought, was given after the executions were placed in the hands of the sheriff, yet the money having been received upon them, after it was given, and whilst it was in force, the parties thereto are responsible for the default of the sheriff in not paying it over. *United States vs. Giles, et al*, 9 Cranch. 212. *Hewett and Russel vs. State use Brown*, 6 Har. and John. 96.

2. That the replication is good in substance, and upon a

general demurrer thereto, the judgment should have been for the plaintiff.

3. That the court erred in awarding an execution for costs against the State which will be corrected upon the appeal. *Charlotte Hall School vs. Greenwell*, 4 *Gill and John*. 409.

4. That should the court be with the plaintiff upon the question raised by the demurrer, a final judgment should be entered in his favour, for the claim as set out in the replication.

ALEXANDER, for the appellees, insisted :

1. That the replication is double, alleging two causes of action, whereof, either if true, might possibly entitle the plaintiff to a recovery.

2. That the causes of action, as breaches, are set forth in the replication, so uncertainly, that it cannot be known whereunto, the defendants are required to answer, and the court cannot give a certain and distinct judgment thereupon.

3. That the replication avers as a breach of the condition of the bond, the non-payment of the money in the replication mentioned to *Nicholas Stonestreet*, but it does not show any interest or right in him to recover the same.

4. That the bond on which the action is brought is not liable for the defaults which are charged in the replication.

DORSEY, Judge, delivered the opinion of the court.

The important question in this cause, as respects the substantial rights of the parties, is whether the appellees, the sureties in the sheriff's bond of the 8th of December, 1829, are liable for the breach set forth in the replication, to which the appellees have demurred. The breach assigned is the non-payment of money received on the 17th of May, 1830, under two writs of *fieri facias*, issued on the 24th of November, 1828, and laid upon the lands of the debtor on the 6th of December, 1828; and on his goods and chattels on the 21st of January, following. The issuing of the executions and their delivery to the sheriff were prior to the date of the bond sued on; the receipt of the money levied under them

was subsequent thereto. The liability of a sheriff's sureties for such a default as that complained of, is distinctly stated in the condition of his bond which defines the duty violated in these words, "shall also well and faithfully execute and return all writs, process and warrants to him directed and delivered; and shall also pay and deliver to the person or persons entitled to receive the same, all sum or sums of money, tobacco, goods, chattels or property by him levied, seized or taken." As soon then as a writ of *fiery facias* is delivered to the sheriff in contemplation of law, it attaches itself to the bond under which the sheriff derives his authority to act as such for the time being, and as far as regards the breach charged in the replication, the bond may be construed in the same manner, as if in terms its condition instead of applying as it does, to "all writs," had embraced that *fiery facias* only.

If such be the true construction of sheriffs' bonds, in reference to breaches of the character of that now before us, it necessarily follows, that the plaintiff has mistaken the bond on which his right of action accrued.

He should have sued on the bond, which clothed the sheriff with his official authority at the time the writs of *fi. fa.* were placed in his hands. Whether it was his bond executed in the year of 1827 or 1828, we are unable to determine; not being informed of their precise dates nor the time between the 24th of November and 6th of December, 1828, when the executions were delivered to the sheriff.

As a case establishing a different doctrine, we have been referred to *The United States vs. Giles and others*, 9 Cranch, 212, but in that case no such point as that now adjudicated, was raised or argued by the counsel concerned; nor did the condition of the marshall's bond contain any such provision as that referred to in the bond of the sheriff.

For the same purpose a *dictum* of this court has been cited from the case of *Hewitt and Russel vs. State use of Brown*, 6 Har. and John. 96. But with the question adjudicated

there, and that now determined, there is the most perfect accordance.

The question there, was whether the securities in the sheriff's bond of December, 1814, were liable for the default of the sheriff, in not paying over money levied under an execution delivered to him in the year 1816, after he had given his official bond in 1815. The court determined that they were not; and in reference to and explanation of the grounds of their determination, they say, "the sheriff's bond is an annual bond, and the securities of each year are responsible for the neglects, defaults, acts and receipts of their principal, during the time only between giving the bond passed by them, and the execution of the next year's bond by the sheriff." This position asserted by the court was assumed in explanation of the grounds on which their decision in that case was made, and was not intended as the enunciation of an universal principle of law, applicable to all cases in which the liability of a sheriff's securities could by possibility be involved. As bearing on the question before them in reference to which they designed to use it, this *dictum* of the court stands clear of all cavil or exception. It was legitimately conclusive of the point decided. They did not mean, as a literal interpretation of their words might import, that if an execution dated anterior to a sheriff's second bond, but returnable subsequently thereto, were delivered to the sheriff and having been executed were not returned by the sheriff, the second bond would be forfeited; because such a default is by the express terms of the condition of the first bond, made a forfeiture thereof. Nor did they mean, that if a short time before the execution of his first bond by a newly elected sheriff, a *fieri facias* were delivered to the old sheriff, and should be by him levied, which was returnable to a term subsequent to the qualification of the new sheriff, and no return thereof should be made, the securities of the old sheriff should not be responsible; because in the language of the court, such a default did not occur, "during the time only between the giving of the bond passed by them, and the exe-

cution of the next year's bond by the sheriff." Such cases as the two last mentioned, were not by the facts of the case in 6 *Har. and John*. 96, brought to the consideration of the court. They were not within their contemplation, and it would be doing them injustice therefore to assume; that they had passed any opinion upon them. To attach to securities in sheriff's bonds, different liabilities from those imposed on them by the opinion of the county court, would be to deprive those bonds of that certain and well defined operation which their terms import; and would leave them for the most part the creatures of the subsequent caprice or designs of the sheriff, who could shift the responsibilities of his securities in different bonds almost at pleasure. The construction given by the county court, to the obligations assumed by the sureties in the several bonds of a sheriff, is strictly conformable to the conditions of those bonds, and to the plainest principles of natural justice. It equalizes as nearly as may be the liabilities of the securities in the several bonds, and properly repudiates the doctrine now insisted on by the appellant, which would in a great measure, render the last bond of the sheriff, answerable for his official acts during his three years' term.

It avoids surprise and injury to parties who look to the sureties in the bond at the time they are about to place process in the hands of the sheriff; and may confide in the sufficiency of those sureties, with a certainty that they are not to be deprived of that security on which they have reposed, by the substitution of another less satisfactory to them, and substituted without their concurrence or control. It has been urged as a ground for the reversal of this judgment, that it gives costs against the *State of Maryland*. This suggestion forms no objection to the validity of the judgment as was adjudged by this court in the case of *Charlotte Hall school vs. Greenwell*, 4 *Gill and John*. 409. But suppose it were, whilst it remains in the record a fatal objection to the judgment; it is a mere clerical error which this court would permit the appellees to cure, by amending the

Sothoron vs. Hardy.—1836.

judgment agreeably to the provisions of the act of 1809, ch. 153, sec. 2. Upon another ground this objection is wholly unavailable to the appellants. It not being a point decided by the court below, the act of 1825, ch. 117, precludes its being brought to the consideration of this court.

The views we have taken of the main point in this cause, relieves us from the necessity of examining the minor questions which have been argued.

Concurring in opinion with the county court, we affirm their judgment.

JUDGMENT AFFIRMED.

WM. H. SOTHORON vs. WM. G. HARDY.—December, 1836.

In an action of *assumpsit* on an open account, the plaintiff to remove the bar of the statute of limitations, proved that within three years of the commencement of the suit, the defendant said to the witness, it was his impression the money had been paid by his, defendant's father. That if his father had paid it, he could find, he supposed, the receipt on searching his father's papers; and if he could not find the receipt, he would settle it; and promised to make a search and inform the witness. *Held*, that the evidence was sufficient to remove the bar.

APPEAL from *Charles* county court.

This was an action of *assumpsit*, brought by the appellee against the appellant on the 16th November, 1834. The plaintiff declared, that on the 2d January, 1820, the defendant was indebted unto *Isidore Hardy*, for meat, drink, washing and lodging, furnished defendant and his servants, or for provender furnished his horses, and for hire of horses, and that *Isidore* assigned and transferred said debt to the plaintiff whereby, &c. and also upon an *insimul computassent* for the same debt. The defendant pleaded 1st, *non assumpsit*, 2nd that the cause of action did not accrue within three years. Issue was joined on the first plea, and replication and issue on the second plea. The plaintiff filed the following account, in *Charles* county court, August, 1835.

Sothoron vs. Hardy.—1836.

Amount of *William H. Sothoron's* tavern account, on the books of *Isidore Hardy*. December 3d, 1818, to the 2nd January, 1820, \$103 18½

CR.

1821, August 17, By *William Dyer's* acceptance for 35 50

To interest on this balance from 2d January, 1821, \$67 68½

At the trial of this cause, the plaintiff gave in evidence the following admissions :

William G. Hardy vs. } Personally appears in open court,
William H. Sothoron. } *William B. Stone*, and makes oath upon the Holy Evangely of Almighty God, that he believes the plaintiff cannot with justice to himself proceed to the trial of this cause, without the evidence of ——— *Griffin*, a legal and competent witness ; that the plaintiff has used reasonable diligence to procure the attendance of said witness, and that he expects to procure his testimony at the next court ; that he expects to prove by said witness, that *Isidore Hardy*, in the account filed mentioned, assigned in writing the said account to the said plaintiff.

William G. Hardy vs. } Personally appears in open court,
William H. Sothoron. } *William B. Stone*, and makes oath, &c. that the plaintiff expects to prove by *Thomas J. Marshall*, that the witness presented the account filed in this cause within three years before suit brought to the defendant, and that the said defendant promised to pay the same in a short time. The plaintiff then proved, that in March, 1833, the plaintiff gave a certain *Thomas Marshall*, an order for \$120 on the said defendant ; that at the time the said order was presented to the defendant, the amount of the account as due to the assignee, accompanied the said order, that the defendant said it was his impression that the money had been paid by his father ; that if his father had paid it, he could find, he supposed, the receipt on searching his father's papers. And if he could not find the receipt, he would settle it, and promised to make a search after court, and inform the witness, which he has never done.

Sothoron vs. Hardy.—1936.

The defendant then prayed the court to instruct the jury, that the plea of the statute of limitations was a bar in this case and that the plaintiff is not entitled to recover, which prayer and instruction the court (*Key and Dorsey, A. J's,*) refused to give; but instructed the jury, if they believe the evidence it was sufficient to remove the bar of limitations. The defendant excepted both to the refusal and instructions granted, and the verdict and judgment being against him he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and ARCHER, DORSEY, and SPENCE, Judges.

ALEXANDER, for the appellant.

Who cited: *Oliver vs. Gray*, 1 Har. and Gill, 217
Kent's adm'r vs. Wilkinson, 5 Gill and John. 497.

J. M. S. CAUSIN, for the appellee, referred to 5 Gill and John. 498.

ARCHER, Judge, delivered the opinion of the court.

If, as we suppose from the bill of exception, the parties went to trial upon the admission of the truth of the facts contained in the deposition of *William B. Stone*, it is remarkable that any question should have been raised as to the sufficiency of the evidence, to take the case out of the statute of limitations; because that contains an express and unequivocal promise to pay.

But standing alone on the proof furnished by the evidence of *Thomas Marshall*, we think the court were right in the opinion they expressed.

The acknowledgment as proved by this witness is in substance, identical with the acknowledgment in 5 Gill and John. 499, except in that case the defendants promised payment, if the account was correct, and it was held to be a conditional promise to pay, and that the plaintiff was bound to prove the account before he could avail himself of the promise. Had the plaintiff in that case established the

Calwell vs. Boyer.—1836.

account by proof, and thereby complied with the condition, the court distinctly intimate, he might have availed himself of the declaration as an acknowledgment to take the case out of the statute.

We are of opinion, throwing the acknowledgment contained in the affidavit of *William B. Stone*, out of the case; that the opinion of the court may be well sustained on the proof of *Thomas Marshall*; the doctrine in the case adverted to governing this.

JUDGMENT AFFIRMED.

NANCY CALWELL, *et al.* vs. HENRY BOYER.—*Dec.* 1836.

It is no objection to a decree for the sale of real estate, for the purpose of distributing the proceeds among the parties entitled, that the interest of a party to the proceedings to a portion of the proceeds, has not been sustained by proof.

It in such a case however, is necessary that the parties litigant, should prove their title to the property to be sold; but when there was nothing in the proceedings putting their title in issue, *prima facie* evidence was deemed sufficient to support the jurisdiction of the court.

Since the act of 1832, ch. 302, all objections to the competency of witnesses, and the admissibility of evidence must be raised by exceptions filed in the court of Chancery, or county courts as courts of equity; and no point relating to either shall be raised, or noticed, or determined, or acted upon, by the Court of Appeals, unless it shall clearly appear in the record, that such point had been raised by exceptions as aforesaid.

Where the court below certified, that a bill had been taken *pro confesso*, against a defendant, and an *ex parte*, commission issued, because he had failed to answer according to the rules of the court; and such rules were not in the record, nor the time of holding its intermediate equity terms prescribed by law; this court will assume the verity of such certificate, and presume that the order *pro confesso*, was legitimately passed.

When a supplemental bill is filed to bring in a new party in interest, such new party alone should be made to respond to it.

The answer of one defendant is not evidence against a co-defendant, even as to matters in contest between the complainant and such co-defendant; and much less would such answer be evidence, in adjudicating upon the conflicting claim of the defendant's *inter se*.

According to the well settled practice in the court of Chancery of Maryland, the issuing and service of a subpoena always precedes the issuing of a commission to take the answer of infants; but a departure from this practice, cannot be made the ground for the reversal of a decree in the appellate court; though at the proper time and for the appropriate purpose, it might have been made the subject of a motion in the court below.

APPEAL from the equity side of *Harford* county court.

On 1st June 1833, *Henry Boyer* filed his bill against *Nancy Calwell* and others, charging that one *Samuel Calwell*, late of said county, departed this life about the year 1800, intestate and seized in fee of a tract of land called the *Grove*; that he left the following children, viz: &c. his heirs at law; that *James*, son of the said *Samuel*, resides in the *State of Virginia*; that *Ann*, one of the daughters of *Samuel*, intermarried with *Thomas Boyer*, and is since dead, leaving the said *Henry Boyer* and his two brothers, *Theodore* and *James*, her heirs at law; that *William*, son of the said *Samuel*, is since dead, leaving a widow, *Polly Calwell*, entitled to dower in her husband's share of said land, and the following heirs at law, &c. *John*, one of the sons of *William*, resides in *South Carolina*, and *Laura*, one of his daughters is an infant; that *Thomas* was another son of *Samuel*, who died intestate and leaving a widow, *Nancy Calwell*, and the following children, &c. heirs at law. And the bill also charged, that it was impossible to divide said land among the several persons interested, and that it would be for the benefit of all concerned, that the same should be sold. The bill prayed *subpœna* against the parties; a commission to take the answers of the infants; and publication against the non-residents; and for general relief.

Subpœnas were issued to *Harford* and *Baltimore* counties, on the 4th June, 1833; and an order of publication passed as prayed. A commission to take the answer of infants was also ordered on the 3d June, 1833, which was issued on the 16th June, 1833. The *subpœnas* were returned to August term, 1833, when *Henry Boyer* filed a supplemental bill to make *Samuel Taggart* a purchaser of the interest of one of

the heirs a party to the proceeding. The answers of the infants by their guardians being in with the proof of publication, the court passed on the 9th June, 1834, an interlocutory decree, *pro confesso* against all the defendants of full age who had failed to appear, and against *Samuel Taggart*, who had appeared and not answered, and ordered an *ex parte* commission to take proof. Upon the return of the commission, the court ordered the tract of land called the *Grove*, to be sold, and appointed a trustee for that purpose on the usual terms. From this decree the defendants appealed.

The questions of fact in dispute upon the evidence appear in the notes of counsel and opinion of this court.

The cause was submitted on the notes of counsel to BUCHANAN, Ch. J. and STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

O. SCOTT, for the appellants, contended :

The appellant suggests to the court, that there is error in the decree in this cause.

1. Because there is no proof of the material allegations in the bill.

2. Because there is no answer for the defendant, *Samuel*, who is alleged to be an infant.

3. Because the order to take the bill *pro confesso*, and to issue an *ex parte* commission, passed before the rule to answer expired.

4. That no notice was given to absent defendants to answer supplemental bill, nor have the infants answered supplemental bill.

5. That commission issued to take the answers of the infants, *Mary Calwell*, *John Calwell*, (of Thomas,) *James Calwell*, (of Thomas,) *Frances Calwell*, *Amanda Calwell*, and *Lucien Calwell*, before the same were summoned.

In regard to the first it will be seen, that there is no proof whatever of the sale to *Taggart* alleged in the bill. In cases like this, where the proceeding is *ex parte*, the com-

plainant will be required to prove strictly every material fact. The sale alleged is a material fact, it makes a new owner to the land, and divests several of the defendants of their interest.

There is no proof of the title of the parties. In a proceeding, all the parties interested in the land ought to be parties, in order that the entire estate may be sold and the money divided.

The only evidence of title in any of the parties, is the testimony of *Bussey*, who states that *S. Calwell*, died seized, and his widow lived on the land a long time afterwards, but when she died or relinquished possession does not appear. There should be proof of the possession since *Calwell's* death. That occurred thirty years ago by the allegation in the bill. The patent should have been produced to shew title out of the *State*. Then perhaps, long continuous possession would have been sufficient.

There is no proof that the persons named as heirs of *S. Calwell*, are his heirs.

No witness speaks to it but *Theodore Boyer*, his testimony is inadmissible. He is a party to this suit and there is no order for his examination. Besides he is interested, he is proving himself an heir, and thereby entitling himself to a part of the proceeds of the sale. A defendant cannot be examined but on special order, and this case being tried *ex parte*, all questions are open here. There being infants in this case every fact must be proved, none can be regarded as admitted by them.

Wherever an infant is a party he must answer by guardian before a decree can be had against him. There is no answer for *Samuel*, one of the infant defendants.

The interlocutory decree in this cause passed 9th June, 1834, and it will be seen by the record, that the rule to answer was laid at the March term, 1834, and that the cause was then continued till August term, so that no order could have been regularly passed till August. The rule to answer must have operated to the day of the next continuance. The

act of Assembly requires, that the rule to answer should have expired before any such interlocutory order was passed.

When a bill is amended or a supplemental bill filed, new answers are required. The infants in this case never answered and never were required to answer the supplemental bill, nor was any notice given to the absent defendants to answer the supplemental bill.

According to the practice in the court of Chancery, a commission to take the answer is never issued till the infant is summoned. In this case the commission issued before the parties were summoned—this is irregular. The infants ought to be summoned to bring them within the control of the court.

If the testimony of *Boyer* be excluded, as it is contended it ought to be, then there is no proof of who were the heirs of *Samuel Calwell*, and there is no proof of the death of *Dorsey Calwell* and *Sarah Calwell*, two of the alleged heirs, if his testimony be retained.

The parties or a number of them cannot claim as heirs to *Samuel Calwell*, from the complainant's own showing *Samuel* died in 1800, leaving children who were his heirs. The present owners must claim as heirs to the children of *Samuel*, and there is no proof who the heirs of the children of *Samuel Calwell* are.

A. W. BRADFORD, for the appellee, contended :

The first objections urged by the appellants to the decree in this case, is the want of proper proof of the material allegations of the bill ; and the first defect in the proof which the appellant's attorney undertakes to designate is, that there is no proof of the sale to *Taggart*, one of the defendants.

To estimate the materiality of this allegation, so far as it relates to the subject matter of the suit, it may be well, briefly to recur to the character of the proceeding, which is a bill filed by one of the heirs at law of an intestate, against the other heirs, seeking a decree for the sale of the real estate of that intestate, and a division of the proceeds. (The land

being incapable of division, and some of the heirs being infants.) After the filing of the bill, *Samuel H. Taggart*, the appellant, becomes entitled to the undivided share of *Thomas Calwell*, deceased, one of the children of the intestate, by a purchase under a decree, and this fact is stated in a supplemental bill, which is filed for the purpose of making said *Taggart*, a party to the proceeding. He now objects that the complainant produced no proof under the commission of this sale to him; to which we reply that the whole proceedings on the equity side of *Harford* county court, under which said *Taggart* became the purchaser, are specially referred to and made part of the supplemental bill, and would shew, if embodied in the record, as they should be, that said sale to *Taggart*, was made and reported under oath by the trustee, and confirmed by the court.

(The appellee could here take occasion to suggest a diminution and defect in the record in this particular, in not setting forth the judicial proceedings thus referred to.)

The supplemental bill thus setting forth this judicial sale, certainly presents such a *prima facie* proof of the fact of sale as will suffice at least, until there is a denial of it by some of the parties interested. Instead of there being such a denial, it will be observed, that the only parties interested in the fact of this sale to *Taggart*, have answered the bill and disclaimed all interest in the subject matter of the suit, *expressly on the ground that this sale to Taggart had taken place*. See the answers of the children of *Thomas Calwell*.

The next defect in the complainant's proof which the appellant undertakes to specify, is that we have failed to prove *title* in the intestate, or to prove that the parties to the bill are his heirs at law. Admitting that we are to prove all the *material* allegations of the bill, yet certainly in the absence of all *denial* of any of those allegations, the *description* of proof by which these averments are to be sustained, will not be required to be *strictly, full and conclusive*. The bill alleged that *Samuel Calwell* died seized of certain real estate—that it descended to a number of heirs at law, some

of whom are infants—that it is wholly incapable of division, and that it would be beneficial to all, if the same were sold and the proceeds divided; and we think that a recurrence to the testimony under the commission will shew these allegations to have been all proven. *Bussey*, one witness, proves that the intestate owned the land for a long time during his life; that he *died seized of it*, and his widow afterwards continued in possession until her death.

It certainly cannot be necessary in a case like this, (as the appellant seems to intimate) that a complainant should produce *strict proof* of title, deducing it from the *State* to the party last seized, as though he were tracing title in an action of ejectment.

The bill does not contemplate any adversary titles, but is simply to procure a sale and division of property in which all the parties have a *concurrent interest*; and having proved that the ancestor owned and died seized of the land, is certainly sufficient to entitle the heirs to a division or sale, at least, until an adversary title is in some manner set up.

The testimony of *Theodore Boyer*, who proves that the parties named in the bill are the heirs at law of the intestate, is next objected to on the ground, that he is one of the defendants, and has been examined without an order for that purpose. To this it may be first replied, that he does not prove himself one of the defendants, nor is there any thing in the record to shew that this witness and one of the defendants is the same person. But if it were so admitted, still we say it is no cause to reverse the decree, because when the proceedings should come before the auditor for distribution of the proceeds among the parties, it would then be the proper time to take proof as to the claims of the heirs or parties entitled, so that no possible injury could result from the admission of this testimony. And as it regards his examination without the order of the court, as there is nothing to discredit or throw suspicion on his testimony, it will not, as we apprehend, be now rejected, if the court are satisfied that an order *would* have passed for that purpose,

upon application. The principle being that where acts are done *bona fide*, for the doing of which an order would on application have been passed, they shall be regarded in the same light as if an order had previously been obtained. *Lee and others vs. Stone and McWilliams*, 5 *Gill and John*. 1.

The *second* objection urged by the appellant assumes what I think is not the fact, viz : that there is no answer for *Samuel Calwell*, one of the infant defendants.

The return of the commissioner appointed to take the answer of this and the other infants, expressly states, that he has taken the answer of *Samuel* and the other infants, and annexed them to his return. The guardian in reciting the names of the infants, does, by what is evidently a mere slip of the pen, use the christian name of *William*, in the place of *Samuel*. This is palpably a mere clerical error, for by so doing it will be seen that he uses the name of *William* twice. But the guardian himself expressly declares, that he answers as guardian for *all the infant children* of *Thomas Calwell*, one of whom is the said *Samuel*, as it appears by the proceedings ; the error is merely in writing the christian name of one child for the other, as it will be hardly supposed there were two of the *same name*.

The *third* objection is also founded on a false hypothesis, viz : that the order for the *ex parte* commission issued before the *rule answer* expired. The county court as courts of equity, are authorized by act of Assembly to hold *intermediate* chancery terms, to which process is returnable, and to which by our invariable practice all such rules operate ; and although it may be said there is nothing in the record to shew this practice, yet we may well reply that the burthen is on the *appellant* to shew that by the practice or the rules of the court the *rule answer* in this case extended as is alleged to August, and had not expired at the June term, when the interlocutory order passed. More particularly is it incumbent on the appellant to shew this, when the order itself states as it does, upon its face that *all the defendants were in default*.

The *fourth* objection is, that no notice was given to the

absent defendants to answer the *supplemental* bill, and that the infants have not answered said bill. To this we reply, that the supplemental bill was of such a character and for such a purpose as to require no answer from any except *Samuel Taggart*, the new party created by that bill. Its sole object, as is apparent, was to make said *Taggart*, (who acquired an interest after the suit commenced) a party to the bill. The same end might perhaps have been answered by an order to amend, but whether proposed in the one way or the other, its object being obviously merely to make a new party, having no relation to any other matter, and not at all affecting the substance of the bill, there was no necessity for a new order of publication as to the absent defendants. Whilst as it regards the infants (if there was any thing in the objection,) it will be seen that they do in effect answer both the original and supplemental bill; their answer coming in long after the filing of the supplemental bill, and all of them except one (*Laura Calwell*) expressly disclaiming all interest on the *very ground of the sale to Taggart*, which is the only fact stated in the supplemental bill. But that there is no necessity that the other defendants should have answered the supplemental bill, will be fully seen by reference to the authorities, which expressly hold, that where *it is merely used for the purpose of bringing in a new party, the defendants to the original bill need not be made parties. Ensworth vs. Lambert, et al, 4 John. Ch. R. 604. 6 Ib. 450.*

The *fifth* and last objection is, that the commission issued to take the answer of some of the infants before they were summoned. In so doing there is nothing contrary to the practice in chancery upon that subject, on the contrary, I think it is generally conformable to that course. In *England*, the practice once was and may still be, whenever the infant was in the kingdom to bring him *personally* before the court, and have his answer taken there; but with us the practice has been invariably different, and there exists no necessity for summoning him at all, if he appears and becomes a party regularly without a summons. And here there would appear

to be still less reason for the previous summons; as all the infants mentioned in the objection disclaim all interest in the suit, which is also manifest from the proceedings exhibited.

The authorities warrant this practice in relation to taking the answers of infants, as will be seen by reference to *Banta vs. Calhoon*, 2 Marsh. 167. *Pendleton vs. McCroy*, Dick. 736. Before concluding these notes I would further suggest, that there does not appear to have been an appearance entered for any of the defendants except *Taggart*, and who would of course be the *sole appellant*, which is in strict accordance too with the fact; the record up to this day shewing no appearance for any of the other defendants—which being the case, several of the objections urged by the appellant, as they have no relation to *his interests*, could not be regarded, it being established that the appellate court decrees only in relation to the rights of those who are properly parties to the appeal. In fact, if I may be permitted the remark, the appeal itself presents rather the appearance of an unnecessary and vindictive proceeding, inasmuch as if the defendant, *Taggart*, or any other was prejudiced by the interlocutory proceeding, based upon his default, he could have come in, and if he had any defence might have been permitted to exhibit it, instead of which, without even to this day opposing any denial to the claims of the bill, he seeks to embarrass it by the prosecution of this appeal.

DORSEY, Judge, delivered the opinion of the court.

The reversal of the decree in this case has been claimed on five distinct grounds. The *first* of which is, because there is no proof of the material allegations in the bill. The alleged defects in the testimony are first, that there is no proof whatever of the sale to *Taggart*, one of the defendants. The object of the bill filed in this case is to obtain a decree for the sale of a tract of land called the *Grove*, whereof *Samuel Calwell* died seized and intestate, in order that by the future decree or order of the court, the proceeds of sale might be distributed amongst those entitled thereto. To

enable the court to pass such decree it is necessary that it should appear, that all persons having an interest in the land are parties to the suit ; that they may have an opportunity of protecting their interests and shewing cause, if any they have, why a sale should not be decreed. It is not pretended that there are any parties in interest, who are not made parties to the suit ; nor has the decree finally adjudicated upon the extent of the rights of any of the parties. It simply provides for a sale of the land, and that the money arising from such sale be brought into court for distribution. It has adjudged no part thereof to be paid to *Taggart*, or to any body else. All and each of the appellants had an opportunity afforded them of coming into court, and shewing cause against the passing of such a decree. Having failed to do so, it forms no objection to the decree that the interest of *Taggart* has not been sustained by proof. The decree is equally necessary and just, whether the title of *Thomas Calwell*, to one-fourth part of the *Grove*, remains in his descendants named in the original bill or vested in *Taggart*, as stated in the supplemental bill. If *Taggart* has no interest in the property, he has sustained no injury from the decree ; and has neither motive or right to ask its reversal. It not being recognized by the decree, the other defendants have no pretence for complaint that sufficient proof has not been adduced to sustain it.

The *second* alleged defect in the proof is, that no title in the property in question has been shewn in the parties litigant in this cause. If this allegation were true, that the decree was erroneous could not be denied. It must be borne in mind in considering this objection, that the title to the *Grove* does not appear by any proceeding in the cause to have been put in issue or in any wise controverted ; on the contrary according to the statements in the bill, the title of all the parties was deduced from *Samuel Calwell* the intestate. The only testimony offered on this subject was that of *Edward F. Bussey*, who deposed, that he knew the land whereon the said *Samuel Calwell*, deceased, formerly lived, which depo-

nent understood was called the *Grove*; that said *Samuel Calwell*, now deceased, owned and held the said land for many years before his death, and died seized of the same, and that his widow continued to hold possession and occupy the said land for many years after the death of her said husband. This proof in such a case we think sufficient *prima facie* evidence of title in the parties in this cause, upon proving themselves the heirs of the intestate, to sustain the jurisdiction of the court over the subject matter.

The *third* defect in the proof which the appellants rely on is, that there is no proof that the persons named as heirs of *S. Calwell* are his heirs, except that given by *Theodore Boyer*, who it is objected is a party to the suit, and has a direct interest in the testimony he gave, which proved that the deponent was one of the heirs of *Samuel Calwell*, deceased. This exception to the testimony of *Boyer*, if interested as stated, if taken at the proper time and place would have been conclusive against its reception. But it now comes too late. By the fifth section of the act of 1832, ch. 302, it is enacted, that hereafter in all causes in the court of Chancery or any county court as a court of equity, all objection to the competency of witnesses, and the admissibility of evidence, shall be made by exceptions filed in the cause, and no point relating to the competency of witnesses or the admissibility of evidence shall be raised in such causes in the Court of Appeals, or noticed, or determined, or acted upon by the Court of Appeals, unless it shall plainly appear in the record, that such point had been raised by exceptions as aforesaid in said court of Chancery or county court. In this case no such exceptions were taken in the county court, and consequently they are inadmissible here. By connecting the testimony of *Theodore Boyer*, with the statements in the bill of complaint to which it refers, it does sufficiently appear who were at that time the heirs of *Samuel Calwell*, to remove any obstacle in this respect to the decree of the county court. The appellants then are not entitled to a reversal of this decree on their first ground.

The *second* ground assigned by them is, because there is no answer for the defendant, *Samuel*, who is alleged to be an infant. The objection here raised, is founded on a manifest mistake in inditing the answer of the guardian to the minors, in which the name of *William*, one of the defendants is twice written, once by mistake for that of *Samuel*. This fact is demonstrated by the return of the commissioner, the officer empowered by the county court to appoint the guardian to the infants and to take their answer, who certifies, that he appointed the said guardian to answer for all the infants, including the said *Samuel*, and that he had taken the answer of the said infants by their said guardian, which he enclosed with his certificate, and on which answer was indorsed the certificate of the said commissioner; that the guardian by him appointed to answer for *the above named infants*, had made oath before him, that the facts stated in the answer were true. Such an objection made at the time and under the circumstances in which this has been urged, we think cannot avail the appellants.

The *third* ground relied on by the appellants is, because the order to take the bill *pro confesso*, and to issue an *ex parte* commission passed before the rule to answer expired. We do not feel ourselves at liberty to say that there has been any irregularity in the passage of this order. Neither the rules of *Harford* county court upon this subject, nor the time of holding its intermediate equity terms prescribed by law appearing before us; and the court certifying that the time to answer had elapsed, we will in the absence of all proof to the contrary assume the verity of their statement, and presume, that the order *pro confesso*, was legitimately passed. There is nothing in the record to shew, that the rule to answer extended to the August term. It may by the rules of the court have been limited to some intermediate day, or to the intervening equity term of the county court.

There is nothing in the *fourth* ground on which it is sought to reverse this decree, to wit: that no notice was given to the absent defendants to answer the supplemental bill, nor

have the infants answered the supplemental bill. None of the descendants of *Thomas Calwell*, whose rights it is alleged in the supplemental bill had passed to *Samuel Taggart*, were absent defendants having an interest in the subject matter. It would have been idle to call on them to respond to it. The assertion that the infants have not answered the supplemental bill is not strictly conformable to the facts. Their answer is substantially a confession or reiteration of the allegations in that bill. But concede that the adult heirs of *Thomas Calwell* were all non-residents, and that the answer of the infants had been confined to the matters charged in the original bill; as concerns the present question it forms no objection to the validity of the decree. The supplemental bill was filed solely for the purpose of bringing in a new party in interest, and he alone should have been made to respond to it. *Ensforth vs. Lambert and others*, 4 *John. Ch. R.* 605, and *McGown and others vs. Yerks and others*, 6 *John. Ch. R.* 450. Suppose all the heirs of *Thomas Calwell* had answered the supplemental bill and denied every fact in it, it could avail them nothing. They could not have used their answers, no matter how responsive they might be to the matters charged in the bill, as evidence against the claims of the defendant, *Taggart*. As to him they were *res inter alios acta*. The answer of one defendant is not evidence against a co-defendant, even as to matters in contest between the complainant and such co-defendant; much less would it be so in the adjudication of conflicting claims between the defendants themselves.

The *fifth* ground on which it is insisted, that this decree should be reversed is, that a commission issued to take the answer of the infant defendants before any *subpæna* was served upon them. According to the well settled practice of the Chancery court of *Maryland*, the issuing and service of a *subpæna* always precedes the issuing of a commission to take the answer of infants. But the matter complained of is a mere irregularity in the process of the court, by which the parties were brought before it to contest their rights. It in no wise affects the principles of the decree, nor forms any

Zeigler vs. Sentzner.—1836.

ground for its reversal. The infant defendants by this departure from the usual course of making them parties to this suit, sustained no injury, were subjected to no inconvenience, were deprived of no right or advantage which they would otherwise have enjoyed. They had the same opportunity of defending themselves by their answer, and protecting themselves from the relief sought by the appellee, as if their appearance in the county court had been affected by the usual course of proceeding. This irregularity in the process of the court by which the defendants were made to appear to the suit, forms no ground for objecting to the validity of the decree. At the proper time and for the appropriate purpose it might have been made the subject of a motion before the county court; but in an appellate court, it cannot be urged as a ground for reversing the decree. The decree of the county court is affirmed with costs, both in this court and the county court, and the case is remanded to *Harford* county court, that such further proceedings may be had therein, as the nature of the case may require to do justice to the parties according to their respective rights and equities.

DECREE AFFIRMED AND CAUSE REMANDED.

JOHN L. ZEIGLER vs. FREDERICK SENTZNER.—*Dec.* 1836.

A court of equity has no jurisdiction over what is called "good will," and where a bill was filed upon a contract alleged to be of that description, claiming of the purchaser or party in possession, an account of rents and profits, arising from certain stalls in market houses in the City of Baltimore, the bill was dismissed, but under the circumstances of the case, without costs.

For the violation of such a contract, if the subject be one fit for a contract, the remedy is at law, where damages may be given by a jury.

APPEAL from the court of *Chancery*.

The bill was filed in this cause on the 21st February, 1834, by the appellee, and charged, that the father of the com-

plainant at the time of his death, and for a long time before was a butcher and victualler of the *City of Baltimore*, and that a long time previous to his death rented and obtained from the *Mayor and City Council of Baltimore* the use and occupation, and the right to use and occupy a certain stand in the Marsh or Centre market house, one in the Lexington and one in the Hanover market house, in the said city, for the purpose of vending meats. That he died possessed thereof, and all the rights and privileges attached thereto; that among other valuable rights and privileges of his father, in and to said stands, and growing out of his occupancy thereof, were the right of pre-emption, and the good will of his father therein. That his father died intestate—that administration was granted to his widow, who removed from *Maryland*; that it is unknown, whether she is alive or dead; that his father's debts are all paid; that the administratrix in consideration of one hundred dollars, consented that the complainant should have the full benefit of said stands; that upon the death of his father the right of pre-emption and good will descended upon complainant, and vested in him or in the administratrix for the use of the personal representatives of his father; that it was of great value; that on the death of his father the complainant being an infant, his uncle was about to renew licenses for said stands, in the name and for the use of complainant, when a certain *John L. Zeigler*, a butcher and victualler, applied to the said administratrix and uncle, for permission to enter upon said stands as trustee for the use of complainant, and promised that if they would permit him so to do, that he would faithfully execute said trust and account for the rents and profits when complainant came of age; that they consented, and defendant in consequence took possession of said stalls and held, used and rented them out for a long time, &c. that complainant is now of full age and defendant has refused to account with him. Prayer for an account and general relief, &c.

An order of publication was also prayed and granted, and publication made against the administratrix as an absent defendant.

The answer of *Zeigler*, the defendant, alleged that the renting of the stalls by the complainant's father was from year to year, every year being a new renting and requiring a new license; that the father was indebted to him; that he has not been paid, and the complainant had no right in the stalls until his father's debts were paid; that the administratrix did not consent that complainant should have the stalls; that the pretended right of pre-emption and good will did not descend as alleged, and particularly as the children of deceased were minors and unable to carry on the business of victuallers, that the renting is at the discretion of the *Mayor and City Council of Baltimore*, exercised through the *Mayor*, who refuses to renew when the rent is in arrear. The answer denied all solicitation, contract or agreement for the use and benefit of complainant touching the said stalls, and asserted that defendant acted on his own sole account, or that he made any profit from them.

A commission was issued and evidence taken, upon which an account was stated, and at March term, 1836, *Bland, Chancellor*, passed a final decree ordering the defendant to bring into court to be paid to the plaintiff the sum of \$1,565, with interest from 11th March, 1836, and costs.

On the 12th May, 1836, the complainant filed a petition praying for a *fi. fa.* which the Chancellor ordered to issue. On the 16th, defendant prayed an appeal, and on the 17th he filed a petition (with an appeal bond,) stating his ignorance that a decree had passed in the cause, until the day before, and that the plaintiff before the defendant had received any notice or knowledge of the decree, had levied an execution on his real property, and that unless the execution was stayed or set a side, he could derive no benefit from his appeal, which he has prayed and secured by bond, the complainant being unable to respond to any decree of restitution, &c. in the event of a reversal. This petition the Chancellor dis-

missed : and on the 7th June, 1836, the defendant filed another petition, reiterating the grounds of his former petition, that the complainant was about to sell his property, and offering to pay the principal, interest, and costs of the decree into court upon condition that the execution should be stayed. This petition was supported by the affidavit of the defendant and one other person. Upon which the Chancellor passed the following order :

Ordered that all further proceedings under the said writ of *fi. fa.* be stayed pending the said appeal, unless otherwise ordered by the Court of Appeals on an application to be made to that court within the first ten days of the next ensuing term thereof on the Western Shore, *provided*, that the said petitioner forthwith bring into this court the said principal sum with the interest thereon and the costs, including the costs of the proceedings on the said writ of *fi. fa.* and upon this petition ; to be deposited by the register in the *Farmers' Bank of Maryland*, as usual ; and in case the further proceedings under the said writ of *fi. fa.* should not be suspended or stayed by the *Court of Appeals*, pending the said appeal, then the said money and costs so brought in under this order to be paid to the said plaintiff, otherwise to remain and abide the event of the said appeal—*provided*, that a copy of this order together with a copy of the foregoing petition be served on the said plaintiff, and also on the said sheriff before the said sale on the 9th inst. This was done on the 8th June.

The cause came on to be heard before BUCHANAN, Ch. J. and STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

It was agreed by counsel, that the motion in relation to the *fi. fa.* under the Chancellor's order of the 7th June, and the general merits of the cause should be argued together.

MAYER, for the appellant, contended :

Upon the merits that the allegation of the bill as to any

trust for the complainant is absolutely denied, and there was no evidence to countervail the answer. There was no proof of profits derived; and the evidence was contradictory as to the value of the good will of the stalls. The case if reduced to one for mere specific performance by re-delivering the stalls is defeated, for they have since been sold. If put upon the ground of express contract, a court of law is the proper forum for the complainant. There was his remedy. The action for money had and received would have given him full redress. A court of equity has not jurisdiction over a mere good will right. *Baxter vs. Connelly*, 1 *Jacob and Walk.* 556. Over such a right as this, flowing from a municipal corporation and dependent on the rotation of its officers, the action must be at law. *Bozen vs. Farlow*, 1 *Merr.* 459.

Upon the motion to stay execution, it was apparent that the execution had been pursued with unparalleled speed. The defendant had no notice of the decree, until he saw his property advertised for sale. In that way he was informed of the decree, and thus his right of appeal was virtually intercepted. Is this court obliged to order the money in court to be paid to complainant, or the *fi. fa.* to proceed? The *fi. fa.* will not be ordered, for the money is here to answer all its objects. A sale is unnecessary in this case. The object of the law and the command of the writ are both gratified as the fund is here. It is then a question of equitable discretion upon the whole cause, whether the court will part with the fund. It is within the case of *Thompson vs. McKim*, 6 *Har. and John.* which shows the control of this court, over this and similar cases. The superior equity is to secure both parties. One in his property and the other in his right of appeal. The rule is, that to prevent a sale an appeal without security shall not avail, but if this debt is fully secured the court require no more, and here the money in court will not be put in jeopardy until the final right is decided. *Willes Rep.* 271. There ought to be notice of a decree in Chancery given before execution, 1785, ch. 72, sec. 25, 1818, ch. 193, sec. 4. A demand of the decree is dispensed with by the

latter act, is dispensed with on the ground of practice, but notice is not. The court are in full possession of the cause and now exercise a discretion regulated by the whole cause.

SPEED, for the appellee, filed notes of his views.

T. P. SCOTT, for the appellee.

The object of the bill, is to obtain an account of rents and profits of certain victuallers' stalls in the market houses of Baltimore, and a specific performance by a re-delivery of them to the complainant, or payment equivalent to their value. These stalls become profitable from the known good conduct of their proprietors, and a custom has long prevailed of renewing the licenses for them to the same person, and upon his death, to his representatives. The custom has created a right, and the good will of a butcher's stall is a thing of profit according to the established reputation of the proprietor. The evidence establishes that the defendant entered into the contract charged, and that such contracts were usual. Then is a good will right the subject matter of contract? Are its incidental benefits the subject of sale? *Bunn vs. Guy*, 4 East, 190. Such contracts will be enforced. 2 Bin. 437. *Seaman vs. Price*, 9 Serg. and Low. 469. 7 Cowen, 307. *Simons vs. Stewart*, 1 Cond. Ch. R. 39. There were particular circumstances peculiar to the cases in 1 *Jacob and Walle*. 560, and 1 *Merrivale*, 459, cited on the other side, which reduced the courts to decline enforcing them, so far as they go to establish a general want of jurisdiction they are overruled by, 1 Cond. Ch. R. 39. The counsel here considered the evidence to show the value of the right in question. The question of jurisdiction as it was not excepted to is not open now under the act of 1832, ch. 302, sec. 5.

Upon the question of execution, no notice was necessary. It had been under the act of 1785, but this grew to be a grievance which was remedied by act of 1818, ch. 193. What necessity is there for a copy to be served on adversary,

if not for demanding compliance with the decree? And when the demand is dispensed with, why give notice to induce the defendant to appeal or make way with his effects. All the complainant had to do was to petition for a *fi. fa.* which he did. We had a right to be in haste, an old man thrust himself in between an infant complainant and his relations, and kept him out of valuable rights. The record teems with the defendant's frauds, and the appeal only follows out his original intentions.

When a *fi. fa.* has once been levied, a writ of error with bond will not stay it. *Beatty's Admrs. vs. Chapline*, 2 Har. and John. And as the Chancellor has left it to the discretion of this court, under this rule we demand an immediate order permitting us to proceed.

R. JOHNSON, for the appellant in reply, discussed the following questions :

1. Whether the complainant was entitled to relief upon the case made by his bill ?

2. Whether if entitled upon the proof ?

3. If entitled to any relief, is he so entitled to the extent awarded by the decree ?

The case made by the bill is, that the ancestor of complainant at one period was possessed individually of a right in certain stalls in the Baltimore market houses. That he died intestate, leaving a widow and two children. The stalls are regularly rented for a pecuniary rent, and licensed for a license fee annually renewed. The charter of the city gave the power, and makes it the duty of the corporation to regulate the markets for the benefit of the community. The bill charges no usage which gives to the proprietor under this annual lease, the right of a renewal to the proprietor or his children. The usage charged is one merely to sell, as between the proprietor and the purchaser. The city may disavow this contract and not renew to the purchaser. I forbear to inquire whether any usage could be ingrafted to take from the *City of Baltimore*, the right to change the duty,

or to impose any obligation upon her officers to renew to the widow or first and second son of a deceased stall-renter. What then is the bill? The complainant seeks to enforce a contract as between defendant and himself, or others for him, by which he has been induced to part with a subject of property. It assumes but that for this, the complainant would have had an existing transferable right which the laws can notice.

At the death of the ancestor, he left no representative capable of doing the business of a victualler, to manage the stalls; or competent to answer to the city for the rent and fees. At his death, if some other person had not sought the stalls, the corporation must have rented them to another butcher. Now the court sees the complainant can only claim by proof of usage of a right in the minor to renew in his own name, or in the name of a trustee for his benefit. For if he has no right which the law can notice, and the stalls reverted to the corporation at the expiration of the ancestor's annual license, and complainant had no right by no contract to relinquish could he be injured. There may be contracts in relation to good will, as where the vendor has the right, and contracts not to act in his trade founded on good consideration may be enforced, because injurious to the proprietor. All these contracts are founded upon a right which is surrendered; an obvious, legal right, but there is no case conferring a right of action short of this.

Is there then on the bill and proof a case which equity can relieve? The general rule is, that when there a remedy at law, there should be no interposition in Chancery. *Adair vs. Winchester*, 7 *Gill and John*. 114. *Dilly and Heckrotte vs. Barnard*, ante. The want of jurisdiction may be urged at final hearing. The act of 1832, does not interfere with that question nor the want of parties. The exceptions under that act are confined to the evidence, and the sufficiency of the averments of the complainant, provided the proof shows he had a cause of action. The point is open, can Chancery grant relief? There is no resemblance between the case,

1 *Cond. Ch. R.* 39, and *Jacob and Walk.* 556, and 1 *Merr.* 459. Whether a contract is valid at law or not, or whether damages be recoverable there, parties cannot be relieved in equity, if it is impracticable to execute an agreement specifically, as where lapse of time has rendered it impossible—and if there be an adequate remedy at law for violation of a contract, the result is the same. As to specific performance that cannot be decreed against this defendant, for at the end of every year the possession reverted to the city, and no decree could pass against her, nor was she bound by any usage. If there was such a contract the remedy must be at law. 1 *Gill and John.* 221. A defendant cannot be turned into a trustee for the sole purpose of conferring jurisdiction. 1 *Con. Ch. R.* 39. The counsel then proceeded to discuss the second and third propositions first stated by him, which relate exclusively to facts. The motion for suspending the execution he submitted on the argument of his colleague.

CHAMBERS, Judge, delivered the opinion of the court.

'The bill in this case does not claim a specific performance of the contract charged. That is impossible, inasmuch as the defendant, now the appellant, has not and never had the title to the property or thing in relation to which, or to the rights attached to it, the contract is said to have been made.

It cannot be sustained as claiming an account for property belonging to an infant, upon which the appellant entered, thereby making himself liable as guardian, because the title to the property occupied never was in the complainant.

Fraud is not alleged in the bill, nor does it profess to be a bill for a disclosure. We have not been able to discover to which head of Chancery jurisdiction we are to refer for the authority to grant the relief claimed in this bill.

The argument for the appellee seems to assume, that there is something in the character of what is termed in the bill, "*good will*," to vest such jurisdiction in regard to a contract for the sale of it. In *Crutwell vs. Lye*, 17 *Ves.* 335, good will is defined to be, "the probability that the old customers

will resort to the old place," and considering this to be what is intended here, we perceive nothing in its character requiring us to adopt such a doctrine upon principle. A careful examination of the cases referred to, and others, has not resulted in finding any decision, asserting that courts of equity will assume jurisdiction over contracts because they relate to good will. They countenance rather the contrary opinion. 1 *Chit. Gen. Prac.* 858, 859, and the cases there cited.

For the purpose of the argument we will concede the utmost, which the complainant, the appellee, here can claim, that good will is as much the proper subject of contract and sale as another vendible property—that the contract of sale is distinctly and sufficiently alleged in the bill and proved by the testimony; yet we think this must be considered a bill claiming damages for the violation of a contract, the appropriate and ample redress for which is to be found in a court of law, at the hands of a jury.

With this view of the case it is unnecessary to enter into a minute examination of the facts as alleged, or to attempt a reconciliation of the testimony.

If a valid contract has been made, and can be established to entitle the appellee to recover for its violation, his remedy is at law, not in equity; if no such contract can be established, he can have no ground of claim before either tribunal.

The decree in this case is accordingly to be reversed; and the bill dismissed; but under all the circumstances of the case without costs. The court will sign a decree accordingly; and also an order directing the money deposited by the appellant to be repaid to him.

DECREE REVERSED.

THOMAS S. WILSON vs. NEGRO ANN BARNET.—*Dec.* 1836.

Proof that a negro woman had been living and acting as a free person from the 27th of July, 1830, to the 11th of October, 1836, does not furnish any evidence whatever in support of her claim to freedom, unless it can be

shown, that the party entitled to her custody and service, knew of her place of residence during the period of her so living and acting.

Thus, where it was in proof, that the petitioner, who was born the slave of a testatrix who lived and died on the Eastern Shore of Maryland, lived as a free woman in the *City of Baltimore*, for the period above mentioned, and who by the will of the testatrix was entitled to her freedom if the residue of the personal estate was sufficient to pay her debts: *Held*, that her so living, did not furnish *prima facie* evidence of the sufficiency of said residue for that purpose, or any evidence upon which a direction to that effect could be given to the jury, there being no proof that the personal representative of the testatrix was aware of her residence.

An order passed by the Orphans' court, directing the administrator to sell the slaves of the testatrix, is not evidence of the insufficiency of the other personal assets, in opposition to the petitioner's right to freedom.

APPEAL from *Baltimore City* court.

This was a *petition for freedom*, filed on the 12th October, 1836, by the appellee, against the appellant. The freedom being denied, at the trial of that issue, the following exception was taken.

The petitioner offered in evidence, that she had been living and acting in the *City of Baltimore*, as a free woman, from the 27th July, 1830, until she was arrested as a slave by the defendant on the 11th October, 1836, and confined in *Baltimore* county jail as a runaway by his order. The defendant, the appellant, then offered in evidence, that the petitioner was born the slave of *Elizabeth Richmond*, late of *Queen Anne* county, in the *State of Maryland*. That the said *Elizabeth*, among other bequests devised as follows: "Item—In case my personal property, other than negroes, shall not be sufficient to pay debts and legacies; I do hereby direct my executor hereafter mentioned, to sell so many of my male negroes until they attain the age of thirty-two years, at which time it is my will and desire that they be free, those under seven years of age I wish to be free at the age of twenty-five, and none to be sold out of the *State*.

"Item—I give and bequeath my negro man *Sam*, to the Rev. *Thomas D. Monnelly*, to serve him three years, at which time I wish him to be free.

"I give old *William*, at his own request, to his friend,

John Holland, a free negro, and all the others who have attained to the age of forty or upwards, to be given or sold for no more than one dollar a piece to such of their free relations as they may choose to go to. As it is my wish and desire that all my *female* negroes may be free at my decease, unless my debts should require the sale of them, in which case I desire, that as many of them that is under the age of twenty five, may be sold until they arrive to that age, and I desire, that all the children that they may have in the time of their service may be free when their mothers are free.

“I desire the female children under the age of six and seven to be given to their mothers.”

The testatrix died on the 7th December, 1831. The will was duly proved and recorded, and letters of administration granted to the defendant.

The appellant also offered in evidence the inventory of the personal estate of the said *Elizabeth*, which included the petitioner, and described her above thirty years of age, and then read an order from the Orphans' court of *Queen Anne county*, from which court the defendant had received his testamentary letters, as follows :

“*Queen Anne county*, Orphans' court, August term, 1836.

On application of *Thomas S. Wilson*, administrator, with the will annexed of *Elizabeth Richmond*, deceased, ordered that he sell at public or private sale at his discretion, for cash or on credit, for not less than the appraised value the following negroes, belonging to the estate of the said deceased, viz : *Ann Barney*, and her daughter, *Ann Milly Gross*, and her two children, *Jacob* and *Jemmy*, and boy *Robert*.”

Thereupon the defendant by his counsel, prayed the court to instruct the jury, that the petitioner is not entitled to their verdict, and that they must find a verdict for the defendant.

1st. Because the petitioner has offered no evidence to show that she was free born. .

2d. Because the petitioner has not offered any evidence to show that she is entitled to her freedom under a deed of manumission.

3d. Because the order of the Orphans' court for *Queen Anne county* is evidence to show, that the personal estate of *Elizabeth Richmond* is insufficient for the payment of her debts, and therefore, the petitioner is not entitled to her freedom under the will of the said *Elizabeth Richmond*. Which the court (BRICE, C. J., NISBET and WORTHINGTON, A. J.) refused to do, and gave the following opinion and instruction to the jury.

If the jury shall be of opinion from the testimony given in the cause, that the petitioner was above the age of twenty-five years at the death of the testatrix, and has been residing in the *City of Baltimore*, and acting as a free woman from the time of her being appraised as a part of the deceased's estate, until the day of filing this petition, with the knowledge and consent of the defendant, her administrator *de bonis non*, it amounts to *prima facie* evidence till rebutted by competent legal proof to the contrary, that the debts of the testatrix, if any, have been fully paid out of other portions of the personal estate, first appropriated by the will for that purpose; and, that the petitioner is consequently free under the provisions of that will. And the court were further of opinion, and so directed the jury, that the inventory and order of the Orphans' court offered in evidence to prove a deficiency of the preferred assets to pay the debts, do not furnish sufficient competent and legal evidence for that purpose, and to rebut the presumption of the petitioner's right to freedom arising from the other testimony in the cause. *The defendant excepted*, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and ARCHER, DORSEY, STEPHEN, and CHAMBERS, Judges.

J. SCOTT, for the appellant.

The case must turn upon the efficacy of the order of the Orphans' court. Under the act of 1796, ch. 67, sec. 13, if the personal estate of the deceased is sufficient to pay debts independent of negroes, the manumission by last will is valid, but not otherwise. The inventory was taken in June, 1832, and the negroes constitute \$2,910 of its aggregate amount, \$4,125. Now, if the order had gone on to aver a deficiency of the personal estate of *Mrs. Richmond*, there could be no doubt about its validity; yet in point of law, it is just as efficacious without that averment, as with it, for to no other purpose could the Orphans' court legally have ordered a sale of the negroes. Judicial tribunals are not presumed to exceed their jurisdiction. Every intendment is to be made in favour of the action of a court, if it be shown to have jurisdiction. 10 *Mod.* 71. 1 *Saun.* 90.

The administrator is bound to account to the Orphans' court for all the property in the inventory, and as this woman was born a slave, has not been manumitted but upon a contingency, the evidence tends to prove that she was still a slave, and should have been returned. 6 *Tern.* 177.

The right to freedom by last will is a statutory right, and cannot exist to the prejudice of creditors, and as the object of the order was to create a fund for payment of debts, it results that the personal estate was insufficient, and the *City court* in error in assuming there was no evidence of that insufficiency.

BARNARD, for the appellee.

The petitioner rests upon the will of her mistress, and the subsequent conduct of the administrator, the defendant, in suffering the petitioner to go at large. The will shows a manumission, and the inventory establishes the fact, that the petitioner was above the age mentioned in the will. The conduct of the appellant showed his assent to the legacy of freedom, and this perfects it. Slight circumstances amount to such assent. It is express or implied. She lived at large,

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and in a state of freedom for several years, within a few miles of the defendant. *Preston on legacy*, 48. 2 *Ventris*, 358.

She was at large before the death of her mistress. Legacy to one in possession. Possession subsequent for years, evidence of consent of administrator. 4 *Devereux*, 57.

The counsel on the opposite side supposes it an act of humanity on the part of the administrator, permitting her to go at large, acting as free. The court and jury below draw a different presumption, and as contrary to his duty, he derived no income, no assets from her services, they inferred his assent to her liberation. 3 *Der.* 399. *Andrews vs. Hunneman*, 6 *Pick.* 126. 2 *Har. & Gill*, 483. 4 *Gill & John*. 277.

There was no proof of the insufficiency of the personal estate, save the order of court which does not allege it. The want of such evidence is the reason why freedom should not be divested. If the order affects her right, she was entitled to an appeal; but even that is lost by the failure to arrest her within thirty days of its passage. The executor's assent to the legacy relates to the death of the testator. *Prest. on legacy*, 49. *Smith and wife vs. Townes, administrator*, 4 *Munf.* 191. Once given it is not revocable. 1 *McCord*, 91. 2 *Hawks, N. C.* 123.

Hence the Orphans' court could not again reach the petitioner, and has therefore excluded its jurisdiction. Again, the use made of this order violates the rule that the best proof should be offered the nature of the case will admit of. The mode of settling the estate should have been exhibited. No proof here that any part of the cash was paid away. No proof of any outstanding debts or that testatrix was indebted. The slave could never impeach this order, and must lose her liberty under the construction insisted upon. The insufficiency of assets should be shown affirmatively. *Miller vs. Negro Charles*, 1 *Gill & John*. 390.

ARCHER, Judge, delivered the opinion of the court.

The court below erred in expressing to the jury the opinion, that if they believed the petitioner had been acting as a free

woman from the time of the appraisement with the knowledge and consent of the administrator, that then such facts amount to *prima facie* evidence that the debts of the testatrix have been paid out of other portions of the estate first appropriated by the will.

The principles of law involved in the prayer it is unnecessary to discuss, because we do not perceive any evidence in the record of the consent of the administrator, that the petitioner should act as a free woman, or that her residence in the *city of Baltimore* was, at any time previous to her arrest, known to him. It is quite as probable she had absconded from service, and that she was arrested by him when he first obtained a knowledge of her residence. She appears by the proof, to have resided in the *city of Baltimore* anterior to the death of the testatrix, until the time of her arrest, and if she had been in the custody and service of the administrator at the time of the appraisement, still there is no evidence whatever, that she departed from that service with the knowledge or consent of the administrator.

The defendant prayed the court's instruction to the jury, that the plaintiff was not entitled to her freedom under the will of the testatrix, because the order of the Orphans' court of *Queen Anne's county*, was evidence to show an insufficiency of assets. We think, however, the court were right in refusing to direct the jury as prayed for by the plaintiff, that the order of the Orphans' court was evidence of an insufficiency of assets.

The doctrine is conceded, that intendments are to be made in favour of judgments of courts of competent jurisdiction, and that facts, as inferences, may sometimes be drawn from their rendition. But these principles cannot be applicable to this case.

The order of the Orphans' court was *ex parte*, and is evidence for no purpose whatever in this case.

The proof of an insufficiency of assets, if such were the fact, was peculiarly accessible to the administrator; he had possession, or title to all the effects of the deceased, and

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might be supposed after such a lapse of time to know all the debts of the deceased. This he should have established by the ordinary *media* of proof, such being alone admissible as the best proof.

We therefore think, that the court were right in rejecting the prayer of the plaintiff, but wrong in the direction they gave to the jury.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

ANDREW ELLICOTT vs. THE UNITED STATES INSURANCE
COMPANY.—*December, 1836.*

In an action of *debt* by the appellant against the appellee, on a policy of insurance issued by the latter, guaranteeing to the bearer on a day named, the sum of \$5,000 on presenting the same at the office of the company; it was *held* on special demurrer to the declaration, in which the plaintiff averred that he was the bearer of the policy, and that the same was presented on the day named, but was not paid, that the action might be maintained.

That such an instrument was as much the representative of money as exchequer bills, bank notes, bills of exchange, or promissory notes, payable to bearer, or endorsed in blank, and as such passed by delivery. That possession was *prima facie* evidence of title, and when sued on by the holder, it need not be averred, that the defendant made the policy with the plaintiff; or with whom it was made, or by whom the securities were deposited, and premium paid; or that the plaintiff was the bearer at the time it was made, or when he became such bearer; or that he was the bearer thereof on the day it fell due, and presented it for payment at the office of the defendant.

APPEAL from *Baltimore* county court.

This was an action of debt, commenced on the 1st May, 1834, by the appellant against the appellee.

The plaintiff below declared, that whereas the said defendants on the 24th day of December, 1833, at, &c. by their certain writing obligatory, sealed with their seal, and to the court now here shown, the date whereof is the day and year aforesaid, in consideration of securities deposited, and of the premium paid thereon, guaranteed to the bearer of such writ-

ing obligatory, the payment of the sum of \$5,000 on the 30th day of April, 1834, on presenting such writing obligatory for payment, at the office of defendants; and the said plaintiff avers, that he was the bearer of the said policy, and that the same was presented for payment on the day and year last aforesaid, but was not paid; whereby an action hath accrued to said plaintiff to demand and have of the said defendants the sum of \$5,000 above demanded.

2nd count—and whereas also afterwards, to wit: on, &c. at, &c. the said defendants were indebted to the said plaintiff in the sum of \$5,000, for so much money had and received by the said defendants to the plaintiff's use, and to be paid to the said plaintiff when the said defendants should be thereto afterwards requested; whereby and by reason of the said last mentioned sum of money being, &c. remaining wholly unpaid, an action hath accrued to the said *Andrew* to demand and have of the said defendants the sum of \$5,000, above demanded, yet the said defendant, although often requested, hath not paid the said sum of money or any part thereof, but to pay the same hath hitherto altogether refused, and still refuse to the damage of said plaintiff, &c.

To the *first* count of this declaration the company demurred specially, and assigned for causes of demurrer:

1st. That it is not averred thereon, that the defendant made the writing obligatory with the plaintiff, nor is it averred with whom the said writing obligatory was made.

2d. That it is not averred who deposited the securities, and paid the premium mentioned in said writing obligatory.

3d. That it is not averred that the plaintiff was the bearer of the said writing obligatory, at the time it was made, nor is it averred at what time and how, the plaintiff became the bearer thereof.

4th. That it is not averred that said plaintiff was the bearer of said writing obligatory on the day it fell due, nor that the plaintiff presented it for payment.

5th. That it is not averred that said writing obligatory was presented for payment at the office of said defendant.

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To the *second* count, that the defendant pleaded *nil debet*. Issues were joined on the demurrer and plea.

The county court (*Archer, C. J. Magruder and Purviance, Judges,*) rendered judgment on the demurrer for the defendant, and the plaintiff took this appeal.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, DORSEY and CHAMBERS, Judges.

R. JOHNSON, for the appellant.

The only question in the case is, whether the holder of a policy of insurance under seal issued by the appellees payable to the bearer, may not sue on it, though he be not the party to whom it was in the first instance issued. It is contended on the part of the appellant, that the instrument in question, though under seal, may be sued on by any bearer in his own name. Act of 1831, ch. 191. *Wookey vs. Pole, et al*, 6 *Serg. and Low*, 324. *Ib.* 218.

No counsel appeared for appellee.

DORSEY, Judge, delivered the opinion of the court.

We cannot concur with the county court in sustaining the demurrer to the first count in the declaration. The instrument of writing or policy declared on, was as much the representative of money as exchequer bills, bank notes, bills of exchange, or promissory notes, payable to bearer, or endorsed in blank and as such passed by delivery. The possession of it is *prima facie* evidence of title, and when sued on by the holder it need not be averred, that the defendant made the policy with the plaintiff; or with whom it was made; or by whom the securities were deposited, and premium paid; or that the plaintiff was the bearer at the time it was made; or when he became such bearer; or that he was the bearer thereof on the day it fell due and presented it for payment at the office of the defendant. 6 *Eng. Com. Law Rep.* 323. *Wookey vs. Pole and others.* 11 *Eng. Com. Law Rep.* 16. *Georgier vs. Mieville and others.* 16 *Eng. Com.*

Law Rep. 217. *Same vs. Same*, and 1 *Gill and John*. 175. *Bowie, use of Ladd, et al vs. Duvall*.

The sixth section of the act of 1831, ch. 191, (by) which *The United States Insurance Company* was incorporated, enacts "that the president and directors shall have full power and authority, to make insurances against all loss and damage from fire, flood, or other casualty, and against all loss or damage, from any cause, hazard, or liability whatsoever on, and relating to factories, mills, bridges, and other works and buildings, and on goods, wares, merchandize, *choses in action*, and personal property of every description; and generally, to make, execute and perfect all such contracts, agreements and other instruments, as may be necessary to carry into effect the provisions of this law." Under the broad and comprehensive powers thus given, we think the appellee was competent to execute such a policy as is the basis of this action; and that in many cases, strong and satisfactory reasons exist, why it should assume this, and no other form. As for example, a merchant holds a trader's promissory note, of whose ability to meet his engagements he entertains some doubt. To secure himself against such casualty or hazard, he applies to *The United States Insurance Company* for their guaranty, and pays the required premium. The form of the instrument, the mode in which the guaranty is to be effected under the act of Assembly, is entirely dependent on the will of the parties; the law adopts it as they shall design to have made it. They might it is true, have put their contracts as nearly as the subject matter would permit in the form of a marine policy, or insurance against fire, but they were under no legal obligation to do so, and certainly, no motive of interest or expediency could have prompted them to such a course of proceeding. It is the interest and policy of merchants to keep their capital or its representative in such a condition as to be at all times convertible into money with as great facility as practicable, and to avoid every thing that might tend to shake or impair the commercial credit of each other. Had a formal policy with the note attached to it been executed,

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specifying the premium paid, &c. and the insured had afterwards thrown it into the market for conversion into money, its natural tendency would have been to impair the commercial credit of the maker of the note, and consequently lessen the probability of its being paid by him at maturity. The insurer therefore under such an arrangement would naturally demand a higher premium for insurance.

The insured it must be presumed, would not have applied for a guaranty from any source, but one, in which both he and the public reposed entire confidence. He could therefore feel no hesitation in surrendering the note to the company, by whom the risk was assumed, and in doing so he would put it in the power of the insurer upon any emergency rendering it expedient, to guard against loss by passing off the note, or making any arrangements to secure its payment which circumstances might make advisable. The necessary result of such a negotiation, would be a reduction of the premium demanded by the underwriter. In such a transaction then, it is manifestly the interest of both insurers and insured, to give to their contract the shape it has assumed in the case before us.

Dissenting from the opinion of the county court we reverse their judgment.

JUDGMENT REVERSED WITH PROCEDENDO.

J. DILLY AND A. G. HECKROTTE vs. NOTELEY BARNARD.
December, 1836.

That a judgment *mala fide*, and by surprise, arising from the fraudulent and deceptive conduct of the adverse party, by which the complainant has been lulled into a security fatal to his rights, would be against conscience, and ought to be enjoined by a court of chancery, is a clear proposition; but it is equally clear, that no person can enlist a court of equity in his favour, unless he enters its doors with clean hands; and when he seeks to be relieved against injustice, arising from the bad faith of his adversary, he ought not to be obnoxious to the same imputation himself.

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No man is entitled to the aid of a court of equity when that aid becomes necessary by his own fault.

The answer of a defendant, when responsive to the bill, is evidence in his favour, though the equity of the complainant's bill is grounded upon the allegation of fraud.

In cases in which courts of equity and law have concurrent jurisdiction, as in matters of account, it seems, that equity will not relieve against a judgment on the mere ground of the difficulty of making a defence at law, but the case must be one where it was impossible to do so.

If facts essential to the case of either party rest in the knowledge of the opposite party, it is too late after a trial at law, for the losing party to apply to a court of equity for relief upon that ground. He should have filed his bill for a discovery before the trial.

After a verdict and judgment at law, the legal intendment or presumption is, that every thing was proved at the trial which was necessary to maintain the suit. *Per Th. Buchanan, A. J.*

If a complainant omits to state an equitable case in his bill, the court cannot notice it, though established by the proof.—*Ib.*

The rule is well established in this state, that the charges, or allegations of a bill, not admitted by the answer, must be proved.—*Ib.*

APPEAL from the equity side of *Allegany* county court.

On the 27th April, 1831, the appellants filed their bill, charging that, on the 9th October, 1824, the said *Barnard*, being indebted to each of the appellants, and to a certain *John Brandt* in divers sums, to secure the same, and to enable *Barnard* (then insolvent, or greatly embarrassed) to comply with a contract between him and *John Strider*, for walnut musket stocks, agreed in writing with the said *Brandt* and these appellants, to transfer into the hands of the appellants, all the gun stocks at, &c. and also all the plank and walnut timber at, &c. for their own use; and the appellants agreed to pay *Barnard* eight cents for all stocks sawed after the date of the agreement, so soon as there should be one thousand or more sawed, and as soon as the stocks should be delivered at *Harper's Ferry*, to pay off two notes, described in the agreement, in musket stocks, to *John Strider*, and afterwards to pay to the said *John Brandt* the unsettled account now between him and *Barnard*, not to exceed six hundred dollars; after which, the appellants were to receive their claims, and the balance to be paid to *Barnard* or his order.

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The agreement also stipulated, that *Barnard* should have possession of a saw mill, the roads leading thereto, and two dwelling houses, until the 1st April, 1825, at a certain rent, for which the appellants agreed to be responsible to amount of seventy-five dollars. The bill then charged, the continuing insolvency of *Barnard*; that the appellants had no intention of obliging themselves to make further advances of money, but upon the condition that the timber, &c. was to be placed in their hands as their property, to be delivered at *Harper's Ferry* as their property, and the money arising from the sale would therefore pass through their hands, and be by them, after *first* retaining the amount advanced, for making them, applied as expressed in the contract; that *Joseph Dilly* paid on account of said contract one hundred and sixty dollars, sixty-two and a half cents, and A. G. Heckrotte six hundred and sixty-nine dollars, thirty-six cents. Accounts showing in detail the mode of payment, were filed with the bill; and the bill further charged, that in the fall of 1824, and spring of 1825, *Barnard* delivered at *Harper's Ferry*, a large quantity of said stocks as his own property; that the appellants' advances have not been paid; that in the year 1825, *Barnard* transferred to his son a large part of the timber mentioned in the agreement, which he sold; that although *Barnard* had at all times since the agreement, been indebted to the appellants in a larger sum than they would have been bound to advance under the contract, yet he never did comply with same; that the said *Heckrotte* in 1826 or 1827, attached in the hands of *James Stubblefield* about five hundred dollars, which arose from sale of stocks delivered by *Barnard* to his son as aforesaid, to satisfy him; that said attachment is still pending. The bill then charged, that in the year 1827, *Barnard* commenced a suit on the aforesaid agreement, against the appellants in *Allegany* county court, to recover damages thereon, and the appellant *Dilly* alleged, that after its institution, he had frequent and repeated conversations with said *Barnard* on the subject of said suit, that said *Barnard* always told *Dilly* to make himself easy on the

subject, that he had no expectation of recovering any damages from him, and even if he could get judgment against him he would never think of compelling payment from him, he, the said *Barnard*, well knowing that *Dilly* had not violated said contract; that the said *Barnard*, in fact, requested the said *Dilly* to make no preparation for the trial of said suit, to summon no witnesses, and go to no expense, that his only object in bringing the suit, was to induce *Heckrotte* to discharge the attachment which he had laid in the hands of *Stubblefield*; that *Dilly*, confiding in these representations of *Barnard*, the necessary preparations for the trial of said cause at law, were not made, and the necessary proofs not had, and that *Barnard* recovered judgment for thirteen hundred and fifteen dollars, fifty-three cents damages, &c. as appears by a copy of the record which was exhibited with the bill. The bill further alleged, that a part of the moneys advanced by the appellants to *Barnard*, on said agreement, could not have been proved at law, the same being confined to the knowledge of *Barnard*, nor could the appellants have proved at law that it was the understanding between them and the said *Barnard*, that they were to retain the sums of money by them advanced out of the *first* money arising from the sale of the stocks, that not appearing in the agreement; and that *Barnard* has issued an execution on his judgment and taken their property. The bill then prayed for a subpœna, injunction against proceeding on the judgment, and for general relief. An injunction was awarded by *Shriver, A. J.* on the 19th March, 1831, the bill having been sworn to, &c. on the 17th.

At the return of the subpœna, *Barnard* answered the bill, admitting the agreement of the 9th October, 1824, and charged that the appellants had violated it, ruined him, and forced him to sue them at law; that they, after notice and full preparation, made a full defence at law in every respect, and that the verdict rendered was a fair and just one, and cannot be questioned in equity; that the property attached by *Heckrotte* was his son's, that his dealings with the appel-

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lants were fair, and their accounts had been fully examined and adjusted before the jury.

After a general replication filed by the appellants, commissions were issued to take evidence, which is sufficiently adverted to in the opinion of the judge of the county court, who pronounced the final decree in this cause.

At April term, 1835, the county court, (T. BUCHANAN, A. J.) passed the following decree; after adverting to the pleadings, the judge proceeded as follows :

The commissions sued out to procure testimony, have all been returned with the proofs taken under them, and the object of the bill is to obtain a perpetual injunction against the verdict and judgment at law. The complainants in general allege, that *Barnard* is, and was their debtor at the time of the trial, and that they are injured by the recovery at law; he avers that he is not their debtor, that he was reduced to ruin by their improper conduct, in refusing to perform their part of the contract, and was compelled to have recourse to an action to recover some remuneration for the injury and losses he had sustained; that he is justly and honestly entitled to the verdict; and contends, that it cannot under the circumstances of the case be impeached in this court. This necessarily involves an investigation of the proceedings at law. It will be seen by recurring to a transcript of the record of the proceedings in that case, which has been exhibited and filed in this cause, that *Barnard*, on the 31st day of March, 1827, brought an action of *covenant* against the complainants in *Allegany* county court, upon the said agreement of the 9th of October, 1824, and recovered a verdict and judgment against them, as set forth in the bill, and admitted by the answer. The declaration in the case sets out the covenant, and protesting that he, *Barnard*, had faithfully performed all the covenants and stipulations on his part to be performed; specially avers that he sawed fifty thousand gun stocks, and had them ready ready and offered to deliver them to the defendants, the complainants in this court. The declaration then proceeds to assign, as specific breaches of the covenant

by the defendants, that they did not pay to said *Barnard* eight cents per stock for all the stocks sawed, as soon as there were one thousand or more sawed; that the defendants did not pay off the two notes to *Strider*; that they did not pay *Brandt's* unsettled account; that they did not apply any money in payment of their claims against the said *Barnard*; and that they did not pay over to him, *Barnard*, any money whatever, but wholly neglected and refused to fulfil their contract, to the damage of the said *Barnard*, in the sum of five thousand dollars. To this declaration, the defendants pleaded general performance, as will be seen by the plea; and afterwards, having obtained leave to amend their pleadings, they pleaded specially, that the said *Barnard* did not transfer to them all the gun stocks at the date of said contract, sawed at *Brandt's* mill, together with all the stocks then at *Western port*, and those at *Paddy town*, and also those at *William Ravenscraft's*; also, all the plank of walnut timber then at *Brandt's* mill; also, all the walnut logs and timber then in possession of, and owned by said *Barnard*, on or near the river either in *Virginia* or *Maryland*, contrary to the tenor of said covenant, and that the same being a condition, precedent to the performance of the covenant on their parts, they were not bound to perform their covenant. General replications were put into these pleas, and by an agreement signed by the counsel of the respective parties, all errors in the pleadings were released.

It must be conceded that all the pleadings were inartificially drawn; they were indeed very imperfect and defective, but notwithstanding this, it distinctly appears to the court, that the merits of the case were before the court and jury.

The plaintiff's claim was founded on the contract, and the declaration, though informal, gave the defendants full information of the nature and extent of the demand against them. The defendants' pleas show conclusively that they were, in fact, apprised of the claim made against them, but after a verdict and judgment below, and the affirmance of the judgment by the court of Errors, it is surely too late for either

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party to the suit, to complain of technical informalities. Here the parties have entered into a contract, containing many stipulations, for the violation or breach of which, by the defendants, *Barnard* brought a suit to recover damages for the injuries he had sustained; the plaintiff could not go beyond the contract, but was limited and confined to it and to the specific breaches he had assigned. The defendants contended, that they had not broken their contract, but that the plaintiff had violated it by not transferring to them all the gun stocks, and other materials at *Brandt's* mill and elsewhere, pursuant to the contract, and which, constituted a condition to be performed by him before he could demand the execution of the contract on their part. The covenant was the foundation of the action, and the pleadings brought the merits of the claim and the defence before the court and jury.

It was admitted in the argument that the county court had jurisdiction of the case, and it is the opinion of this court, that the legal tribunal had exclusive cognizance of it, and that *Barnard* could not have had redress in equity for the injuries sustained by him. He claimed damages for the breach of a contract; it was a legal demand, proper to be adjusted at law, and had he sought redress in equity, his bill, upon the established principles of chancery, would have been dismissed; for that court will not, except in certain enumerated cases, entertain jurisdiction of a cause when the parties have a clear efficient legal remedy. It was urged in the argument, that the defendants' defence was not available at law, and even if it was, that this was a case proper for equity, as the legal tribunal could not, from the nature of its organization, adjudge a complicated matter of this kind, which would require investigations and calculations that no jury could make with any degree of correctness, however upright and intelligent they might be. There is some truth in this observation, but if it be admitted that the county court had jurisdiction, it follows, that the verdict and judgment ought to be conclusive on all other tribunals, otherwise, the consequence would be, that in no case would a recovery at law be a bar to relief

in equity. The question was, had the defendants violated their contract with the plaintiff? And if so, what injury or damage had he sustained? That the defendants might have availed themselves of any legal defence to the suit, cannot admit of doubt. The plaintiff in the suit at law, must have shown his title to recover, otherwise, he could not have obtained the verdict of the jury; on the other hand, the defendants had an ample opportunity of contesting the plaintiff's right or title to damages, by calling for proof that he had done all that was necessary to sustain the suit, or that they, the defendants, had performed the contract on their part; had the plaintiff failed to establish his title, the verdict must have been against him, or had the defendants succeeded in convincing the jury that they had fulfilled their part of the contract, the result would have been the same. After a verdict and judgment at law, the legal intendment or presumption is, that every thing was proved at the trial which was necessary to maintain the suit. If the defendants had an equitable and not a legal defence, what was it? It is not suggested in the bill nor proved by the evidence taken under the commissions, and even if it had been proved, the court could not judicially notice it, the complainants having omitted to charge it in the bill of complaint. Had the complainants any claims against *Barnard* which were not allowed or credited at the trial? The bill states that *Dilly* had paid on the contract one hundred and sixty dollars, sixty-two and a half cents, and that *Heckrotte* paid or advanced six hundred and sixty-nine dollars, thirty-six cents; as by exhibits A and B will appear; no other payment or advances are alleged, and the complainants do not state that their accounts A and B were not allowed by the jury on the trial. The defendant, however, avers in his answer, that such items of the account B, as the complainants were entitled to a credit for, were agreed upon and adjusted; and *James Murphy*, a witness, sworn under the commission to *John McHenry*, proves that *Dilly's* account for one hundred and sixty dollars, sixty-two and a half cents, was also allowed by the jury; and further, that the account B,

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was allowed, under the commission to *Harper's Ferry*. *James Stubblefield* was examined as a witness, and he proves some acknowledgments of *Barnard*, that he owed *Heckrotte* eight hundred dollars. That is not charged in the bill, and therefore, cannot be judicially noticed; but *James Murphy* proves, that *Barnard* paid the said sum of eight hundred dollars to *Heckrotte*, and the receipt for the payment is exhibited and proved in evidence. But if none of these payments or credits were allowed or taken into consideration at the trial, whose fault was it? They were certainly known to the complainants, and if from neglect or inattention on their part, they were not claimed, however disastrous the consequences may be, they can form no ground of relief against a judgment at law. The complainants allege in their bill, that they could not have proved at law, a part of the advances made to *Barnard*, nor the understanding and agreement between them and *Barnard*, that they should retain the sums of money advanced by them on the contract, out of the first moneys arising from the sale of stocks, the same being confined to the knowledge of the defendant. Here is another instance of gross neglect on their part. If they really wanted such a disclosure of facts from *Barnard*, why not file a bill of discovery against him? The suit at law continued eighteen months before the trial took place. They had ample time and opportunity to obtain his answer, and must take the consequences of their own omission and negligence. It will be observed that *Barnard's* was a joint claim against *Dilly* and *Heckrotte*, founded on the agreement aforesaid. It could not be separated, and the defence of one was equally the defence of the other. They are identified in interest, and independently of the alleged agreement of *Barnard* with *Dilly* to release him from the judgment which will be made the subject of a distinct consideration. One has no superior equity to the other, and the court cannot discriminate between them; both or neither of them is entitled to the equitable interposition of this court; no fraud is imputed to the transaction. It may be, that the complainants omitted to procure evidence

necessary to their defence at the trial ; and if so, their situation is to be regretted. But how does this case differ from any other judgment at law where the party has neglected his business ; here, the court is called upon to review the proceedings at law, and relieve against the judgment, on the very grounds that were litigated and discussed before the jury, in a case too, where a court of equity has, in the judgment of this court, no original jurisdiction. On this branch of the subject, the court is of opinion, that the case presented, does not furnish the shadow of a ground for its equitable interposition.

Passing from this view of the subject, which has been exclusively restricted to the proceedings at law, to the allegations of the complainant, *Dilly*, that *Barnard* told him to make himself easy, that he had no expectation of recovering any thing from him ; that he would not, if he could, compel payment from him ; that he requested him, *Dilly*, not to make any preparation for the trial, alleging that his object in bringing the suit, was to compel *Heckrotte* to dismiss the attachment he had laid in the hands of *Stubblefield* ; and that confiding in these assurances of the said *Barnard*, he did not make the necessary preparations for the trial. How stands the matter ? Are the facts charged admitted by the answer ? *Barnard* admits in his answer, that he offered to compromise matters with *Dilly*, if he could only obtain justice ; that on the morning of the day of the trial at law, he offered to compromise and settle with *Dilly* on terms of justice, at which time *Dilly* absolutely refused all offers and terms of compromise, and insisted upon the trial, leaving the defendant no alternative but to proceed with the trial of the cause. *Dilly* states, *Barnard* gave him absolute and unqualified assurances that he expected and would receive nothing from him, and requested him not to prepare for the trial, that his only object was to get at *Heckrotte*. *Barnard* states, that he offered to compromise matters with *Dilly* on terms of justice. *Dilly* avers in his bill that, confiding in the assurances given him by *Barnard*, he did not make the necessary preparation for the

trial. *Barnard* states, that on the morning of the day on which the cause was tried, he repeated the offer to compromise and settle with *Dilly* on terms of justice, when *Dilly* absolutely refused all terms of compromise, and insisted on the trial; so far then, from admitting, the answer virtually and substantially negatives the allegations of the bill. If there should be doubts on the point, it must be acknowledged by all, that the answer does not in fact, admit the charges in the bill.

It was contended in the argument, that the allegations of the bill not denied by the answer, are admitted, and authorities were adduced to sustain that position. The law upon this subject has fluctuated, but it is conceived that the rule has been completely established, at least in this state, that the charges or allegations in the bill, not admitted by the answer, must be proved. *Gill & John*. 510. 6 *Wheaton*, 472. The facts charged in the bill, not being admitted by the answer, are they proved by the evidence in the cause? All the witnesses concur in this. *Barnard* was reluctant to sue *Dilly*, and wished to fix his claim on *Heckrotte* alone, who, he alleges, had treated him ill, but that it being a demand against *Dilly* and *Heckrotte*, he was compelled to join the former in the action. Let us inquire what was the nature of the proposition or assurances made by *Barnard* to *Dilly*. Were they positive and absolute as alleged by the complainants, or qualified and conditional, as averred by the defendant? It will be seen at once, that this is a question of vital importance to the parties, and was so considered by them from the number of witnesses that were examined, and whose depositions have been returned with the commissions. *Henry Myers* and his wife, and the two *Porters*, John and Henry were examined on the part of the complainant; *McCulloh*, *Murphy*, *Bruce* and *Buskirk* for, and on the part of the defendant. The court has devoted to this part of the subject, particular attention; for notwithstanding the verdict at law, the court is not without apprehension that some injustice may have been done to the complainants, or more correctly speaking,

that *Barnard* may have obtained a verdict and judgment for more money than he was entitled to; not that any blame or censure is to be attributed to the jury, which was confessedly composed of intelligent and respectable men, and whose verdict, from the time consumed in the trial of the cause, must be considered as the result of the best judgment they could form on the facts and evidence before them; but the court is sensible from the nature of the case, that the discussion before the jury must necessarily have been perplexed and complicated, and how difficult it is in such cases, constituted as the courts are, to arrive at correct conclusions. The court felt the force of these considerations, and the necessity they imposed of scrutinizing the evidence taken under the commissions, and the result is, that the court is not satisfied of the truth of the facts alleged by *Dilly*, as the ground of his application for relief in this court.

There is some little confusion in the depositions of *John* and *Henry Porter*, but the court is convinced from the depositions of *Myers* and *wife*, and those of *McCulloh* and *Murphy*, that the only proposition or assurance made by *Barnard* to *Dilly* was, that he would not enforce his claim against *Dilly*, if he, *Dilly*, would remain neutral, making no defence to the action, and leave the controversy to be adjusted exclusively between *Barnard* and *Heckrotte*. Did *Dilly* withdraw from the defence of the suit or not? That he did not, but on the contrary, that he did in fact, take an active part in defending the suit, is abundantly and positively proved by the evidence of *McCulloh*, *Murphy*, *Bruce* and *Buskirk*. On the day of trial, it is positively proved, that he refused all offers of compromise by *Barnard*, and set him at defiance, and Mr. *Buskirk* proves, that he was employed by *Heckrotte* and *Dilly* to defend the suit, and *Dilly* paid him for his services. It may be asked on what ground, peculiar to himself, can *Dilly* claim the interposition of this court? He joined with *Heckrotte* in defending the suit, he broke the condition on which alone *Barnard* could be restrained from enforcing the judgment, and after taking the chances at law, he now applies to

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this court as a court of equity for relief. The application cannot receive the countenance of the court.

It was urged in the argument, that the conduct of *Barnard* rendered *Dilly* indifferent to the issue of the proceeding at law, prevented him from preparing for his defence, and placed him under the protection of this court. This is answered by a reference to the evidence in the cause. The established principle in chancery is, that a party shall not be aided after a trial at law, unless he can impeach the justice of the verdict by facts, or on grounds of which, he could not have availed himself, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part. 1 *John. ch.* 51. 3 *John. ch.* 356. Apply this rule to the case under consideration, and it is manifest from the facts, that the complainants have not brought themselves within any of its provisions. The bill seeks for a discovery of facts, and prays for an injunction against the judgment at law, and for such other redress as the nature of the case may require. The complainants might have had redress for any claim which they could establish against *Barnard*, unconnected with payments or advances made to him on the contract, and which were not before the jury on the trial. They have exhibited two claims marked A and B, but have failed to prove them, or either of them by any evidence in the cause, and even if they had been supported by proof, it is proved by *James Murphy*, that they were allowed by the jury; there is no ground, therefore, on which the court can afford them any relief.

The complainants' bill is dismissed with costs.

From which decree the said *Dilly* and *Heckrotte*, appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and ARCHER, CHAMBERS, STEPHEN, and SPENCE, Judges.

R. JOHNSON, for the appellant, contended :

That the cause was too complex and involved, both as to

parties and accounts, for the comprehension of the jury, and therefore, properly the subject of a bill in chancery, even after a trial and verdict at law. *Pickett vs. Stewart, et al*, 1 *Randolph*, 479. *Hughes vs. Blake*, 6 *Wheat*. 459. 1 *Sch. & Lif*. 205.

And the counsel here went into an enumeration of all the inquiries of fact, which were necessarily submitted to the jury in the action at law upon the argument, and showed that they were sufficiently various and distinct to bring this cause within the decisions relied on by him. He insisted, that the main ground of relief, resulted from the representations of *Barnard* to *Dilly*, that he did not intend to charge him with the verdict, which constituted an exception to the general rule, as to the inviolability of verdicts and judgments. It would be against conscience, if prevented from availing himself of a defence at law by the plaintiff, the defendant should still be bound. *Marine Insurance Company of Alexandria vs. Hodgson*, 7 *Cranch*, 336. *Vaughan and wife vs. Wilson*, 4 *Hen. & Mun*. 453. *Poindexter vs. Waddy*, 6 *Mun*. 418. *Pickett, et al vs. Stewart et al*, 1 *Rand*. 479.

This case was, in truth, rather a question of fact than of law. If the misconduct imputed to *Barnard* exists, there can be no doubt about the law.

The actual want of preparation for trial, caused by defendant's representations, constitutes the fraud complained of. Before the trial, the appellants had not the opportunity of doing all they could have done, but for the promises of *Barnard*; and notice of a different course on the morning of the trial, was too late to remedy the consequences of the previous assurances, unless the court believed that at the trial, the appellants were as ready as they would have been under different circumstances. There is a special equity in this cause. The evidence shows, that *Barnard* was fearful of the result, as respects both the defendants at law. The proposal that *Dilly* was to take no part, indicates that something was wrong. If the money was due under the contract, what difference if *Dilly* did take part. *Barnard* knew that the de-

fence rested in *Dilly's* hands, and had no right to prejudice *Heckrotte* by quieting *Dilly*.

MAYER, for the appellee.

The principle stated in *Gott and Wilson vs. Carr*, 6 *Gill & John*. 312, are like those relied on in 7 *Cranch*, upon proof of proper diligence, a party deprived of his defence at law, by fraud or accident, is entitled to relief in equity. *Lansing vs. Eddy*, 1 *John. Ch. Rep.* 51. *Smith vs. Lowry*, 323. *Smith vs. Brush*, 460.

The discretionary power of equity is narrowed down, in consequence of the power of courts of law to grant new trials ; and where the loss of evidence goes only to a part of the damages, equity will not interfere, nor where the object is to show a witness perjured. The injury which authorizes equitable relief, must annul the whole cause of action. After judgment at law, the defendant cannot say his evidence was in the peculiar knowledge of the plaintiff. Where a party is not indebted *at all*, in such cases, false representations lulling to security, will be redressed in equity ; and where two defendants are liable for each other, no evidence affecting one, putting him off his guard, can avail the other. The proof here is, there was a debt due, and as *Heckrotte* was certainly liable, the judgment cannot be enjoined. But the fact is denied, and here the council examined the proof. He contended, the cause was not to be tried again. The cause was settled, except on equitable circumstances, and these could not be founded upon the indulgence proffered by *Barnard*. There is no complexity in the cause, and no proof of imputed ignorance in the jurors. It is the interest of the republic, that there should be an end to litigation, and this rule it is better to observe, than to find reasons for interference, in the ignorance of juries or the tricks of dishonest plaintiffs. Equity does not interfere upon fancied grounds of honour, to correct the supposed errors of inconsiderate jurors or the designs of crafty plaintiffs ; yet, while this is asserted, we

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meet this case upon the glowing facts of its merits. Perfect justice cannot be done in every case. 1 *Sch. & Lif.* 205.

STEPHEN, Judge, delivered the opinion of the court.

The appellants in this case, filed their bill to be relieved against a judgment rendered on the common law side of *Allegany* county court, on the ground of its being contrary to equity, and obtained *mala fide* and by surprise. The principles upon which courts of equity grant relief in such cases, have been frequently the subject of decision by that tribunal, not only in *England*, and in our sister states, but have also been authoritatively settled by this court.

The merits of this case, therefore, as was correctly observed in the argument, resolve themselves more into a question of fact than a question of law. In 6 *Gill & John.* 312, this court, in adverting to the doctrine of courts of equity upon the subject of administering relief against judgments at law, after stating the general principle, say: "that every person is bound to take care of, and protect his own rights and interests, and to vindicate them in due season, and in the proper place," and then lay down the following well established general rule: "that a court of equity will not relieve against a recovery in a trial at law, unless the justice of the verdict can be impeached by facts, or on grounds of which, the parties seeking the aid of chancery, could not have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with any negligence or fault on his own part." The rule here laid down, is wise, salutary and politic, and has received the sanction, not only of the *English* courts of equity, but of the highest judicial tribunal in this union. *Marine Insurance Company of Alexandria vs. Hodgson*, 7 *Cranch*, 332. There chief justice *Marshall*, in delivering the opinion of the court, says: "without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said, that any fact which

clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule, that a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court, that the defence ought to have been sustained at law." The cause of action upon which the judgment was obtained in this case, which is sought to be relieved against, was one, properly and generally speaking, exclusively cognizable in a court of law, and not a fit subject for the exercise of equitable jurisdiction, and to bring it within the proper and legitimate cognizance of a court of equity, it is incumbent upon the party seeking redress in that forum, to state the grounds upon which he was unable to defend himself at law.

The title of the complainant to the assistance of a court of equity in such a case, must be exposed by the pleadings, and the ground principally relied upon in this case, is the want of preparation to try the cause upon its merits, arising from the false promises and fraudulent conduct of the defendant. That a judgment obtained *mala fide* and by surprise, arising from the fraudulent and deceptive conduct of the adverse party, by which the complainant has been lulled into a security fatal to his rights, would be against conscience, and ought to be enjoined by the remedial powers of a court of equity, is a clear and self-evident proposition, about which, in a court of conscience at least, no doubt, we think, can or ought to be entertained; and if such was the character of this case, the appellants would unquestionably be entitled to the relief which they seek to obtain. But we think, that the proofs in the cause fully demonstrate that they have no such standing in this court, and that if injustice has been done upon the trial at law, it was under circumstances, which will not warrant the interference of a court of equity.

It is an established principle, that to enlist the countenance of such a court in his favour, a party must always enter its doors with clean hands; and when he seeks to be relieved against injustice, arising from the bad faith of his adversary, he ought not to be obnoxious to the same imputation himself. It is one of the maxims to be found in *Kaine's* principles of equity, collected by *Fonblanque*, at the end of his treatise on equity, "that no man is entitled to the aid of a court of equity when that aid becomes necessary by his own fault." The application of such a principle to this case, we think, decisive of the merits of this controversy. The proof in the cause, shows beyond doubt, that the promise of the appellee to *Dilly*, one of the appellants, was not absolute, but conditional in its character. It was, that if he would take no part in, but would entirely withdraw from the defence of the action instituted against himself and *Heckrotte*, that he, *Dilly*, should be released from all responsibility to pay the judgment, which might be obtained against them. The offer or proposition then, being conditional in its nature, to obtain the benefit of it, it was incumbent upon *Dilly* not only to prove that he acceded to it, but that the terms it contained have been honestly and faithfully performed on his part. This would seem to be not only the requirement of law and justice, but the dictates of common sense. *Dilly*, one of the appellants in this case, as his ground of equity states, that relying upon the representations of the appellee, he did not make the necessary preparations for the trial of the cause, and the proofs necessary to a fair investigation of the matters in controversy were not had at the time of the trial.

It is to be observed, as was remarked by *Chancellor Kent* in 1 *John. Ch. Rep.* 322, where a want of preparation at law was charged as a ground of equity, that it *does not* appear that any application was made on his part to postpone the trial; on the contrary, it appears in proof, that during the trial term, and shortly before the jury was empannelled, he not only rejected overtures for a compromise or accommodation, made on the part of his adversary, but enlisted counsel in

his defence, and threw down the gauntlet of defiance to his opponent. It further appears, that witnesses were summoned and examined upon the trial, either by *Dilly* or his co-defendant *Heckrotte*, and if it may not fairly be inferred from the proofs and proceedings in the cause, (which opinion we are inclined to adopt,) that *Dilly* voluntarily waived any advantage which he could have derived from the offers or propositions of *Barnard*, yet, the answer in this case shows, that he made a full defence, and being responsive to the bill, and not rebutted or disproved by testimony, is evidence of that fact for the defendant. and that too, even where the equity of the complainant is grounded, as in this case, upon the allegation of fraud, 7 *Cranch*, 69. This fact, that the defence was a complete one, and that the cause was fully tried upon its merits is also an answer to that part of the complainants' equity, which is founded upon the complexity of the case, and his inability to make his defence in a court of law. It is further to be observed, that as to the complexity of the case, and the difficulty of defending themselves at law, they have not made that fact an allegation in their bill, and that they should have done so, appears to have been necessary. See *Wyatt's Prac. Reg.* 232, where he says, "when it is prayed to stay proceedings, it is commonly upon some matter suggested in the bill, as that the complainant is not able for some reasons shown, to make his defence in the other court, though he hath a good discharge here in equity; that the other party has a penalty on him which he proceeds for at law, and threatens to make the complainant pay, or that the other court has not jurisdiction of the cause, but it is cognizable here, or that the other court refuses him some rightful advantage, or does injustice to him in the proceedings, or has not power to do him right: *et similia*." To the same effect, see 1 *Maddox Chan.* 1089. The principle upon which chancery interferes in such cases, is laid down in the following terms by Lord *Redesdale*, in 1 *Sch. & Lef.* 205. "The inattention of parties in a court of law, can scarcely be made a subject for the interference of a court of equity; there

may be cases cognizable at law, and also in equity, and of which, cognizance cannot be effectually taken at law, and therefore, equity does sometimes interfere, as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law." Even, therefore, in cases where the court of equity has concurrent jurisdiction with a court of law, as in matters of account, it seems that equity will not relieve on the mere ground of the difficulty of the defence in a court of law; but it must be a case where it is impossible for the party to make an effectual defence before that jurisdiction. In the case now before this court, no such allegation is either made or proved, and in the language of the distinguished chancellor, whose opinion has just been referred to, we think it unconscientious and vexatious to bring into a court of equity, a discussion which might have been had at law. As to the facts which are charged in the bill, to have rested exclusively in the knowledge of the defendant, and the exhibition of which, were essential to a fair and just decision at law; it is only necessary further to remark, that after a verdict at law, the party who complains of it, comes too late with a bill of discovery. 1 *Vernon*, 176-7. So in 1 *John. Chan. Rep.* 51. Chancellor *Kent* refers to a decision of Lord *Hardwicke*, where he says, it must appear that the defendant was ignorant at the time of the trial, of the fact, which renders the verdict at law contrary to equity, and even then, chancery will not relieve, where the defendant submits to try it at law first, when he might by a bill of discovery, have come at the fact, by the plaintiff's answer, before the trial at law; and the complainants in this case, had ample time to file such a bill, because it appears at the trial term, they applied for, and had leave to amend their pleadings, and the cause was continued to the next court. We do not, therefore, think that the complainants or either of them, were entitled to the equitable interposition of a court of chancery in their favour; and we are therefore of opinion, that the decree of the court below was correct, and ought to be affirmed.

Allegre vs. The Maryland Insurance Co.—1836.

ALLEGRE'S *Adm'rs* vs. THE MARYLAND INSURANCE CO.
December, 1836.

In an action of covenant upon a policy of insurance, in which the words "with liberty," of a port were used, it was *held*, that those words, confer a power subordinate to the general course of the voyage.

They do not necessarily import an intention to trade at the port mentioned; nor do they amount to an assurance, or intimation to the underwriter, that the assured looked to the port of privilege under any circumstances in the contemplation of the parties, as that, at which the voyage was designed to terminate.

Mere awakening circumstances, inciting the underwriter to inquiry, are not sufficient to relieve the assured from the necessity of making known to the former the fact, that the cargo for insurance consisted of live stock. A knowledge of this fact, previous to the insurance, must be shewn in the underwriter, or an imputed knowledge, by proving, that on the voyage insured, live stock is the only article of commerce; and such imputed knowledge does not result from the introduction into the policy of the words, "with liberty," of the port, to which such exclusive trade is shewn.

When insurance is demanded on live stock, it is the duty of the assured to notify the assurers of the nature of the cargo, and his failure to do so, vitiates the policy.

APPEAL from *Baltimore* county court.

This was an action of covenant on a policy of insurance. It is the same case reported in 6 *Har. and John*. 408, and 2 *Gill and John*. 136, to which reports the reporters now refer for a more detailed account of the evidence in the cause.

The policy on which the claim was founded, was at, and from *Rio de la Plata* to *Havana*, with liberty of *Martinico*; on the cargo of the brig *Eugene*, *Charles A. Chatumeau*, master, valued at \$6,000.

The cargo with which the brig sailed, consisted exclusively of mules and jackasses; and on her voyage, and before she reached *Martinico* she encountered a violent storm, which killed the principal part of the live stock, shattered the vessel and forced her to repair to *Rio de Janeiro*, where she was condemned as unworthy of repairs, and with a small number of mules remaining alive, sold for account of whom it might concern. The cargo was regularly abandoned. There was evidence to show, that the principal trade from *Rio de la*

Plata to *Havana*, was in *beef*; mules and jackasses were sent to the *French West India islands*. A trade exclusively in mules and jackasses from *Rio de la Plata* to *Martinico*, and proof of mules, &c. being occasionally shipped from *Rio* to *Havana*, with jerked beef. There was also proof of a usage among underwriters in *Baltimore*, to consider that words liberty of a place in a policy of insurance gave liberty to trade; so did liberty to touch, or liberty to touch and stay. There was evidence also of a prevailing practice to use *Martinico* for the purpose of procuring a clearance from that port for *Havana*.

After this evidence the plaintiffs prayed the following instruction to the jury: if the jury find from the evidence in the cause, that at the time of making the policy of insurance in this cause, and before, the trade from the river *La Plata* to *Martinico*, was exclusively in mules and other live stock exported from the river *La Plata*, and that mules were an article of trade and export from *Rio de la Plata* to *Havana*, during the same period; and if they also find, that by the general usage of trade of the city of *Baltimore*, at the time of making the said policy, and before, the "*liberty of Martinico*," mentioned in the policy, and in the order of insurance in this cause, was understood and construed to give the assured the right of carrying a cargo from *Rio de la Plata* to *Martinico*, and there selling the whole cargo, and of terminating the voyage there, if the assured thought proper to do so, then if the jury shall believe the rest of the evidence offered by the plaintiffs in the cause, the plaintiffs are entitled to recover, notwithstanding the omission to specify live stock, or mules and jackasses, as the cargo meant to be insured. Which instruction the court refused to give.

The plaintiff then moved the court to instruct the jury as follows: if the jury find from the evidence in the cause, that according to the course of trade, at and long before the making the policy of insurance in this cause, mules and other live stock were the sole articles of export from *Rio de la Plata* to *Martinico*; and that at the time and long before

the making of said policy, mules were an *ordinary article* of export from *Rio de la Plata* to *Havana*; and if the jury further find that by the usage and practice among merchants and underwriters in the city of *Baltimore*, at and long before the time of making the said policy, the "*liberty of Martinico*," mentioned in the order for insurance in this cause, and in the policy aforesaid, conferred upon the assured, the option of going to *Martinico* from *Rio de la Plata*, and selling there the whole cargo laden at *Rio de la Plata*, and of making *Martinico* the termination of his voyage, or of selling a part of his cargo at *Martinico* and carrying the remainder to *Havana*, or of unlading his whole cargo at *Martinico* and taking in and carrying a new cargo thence to *Havana*; and further, if the jury do not find that *Martinico* was ever used as a port to get a clearance to enable a vessel sailing from *Rio de la Plata* to *Havana*, to obtain an entry into *Havana*, then the fact that the direct trade from *Rio de la Plata* to *Havana*, consisted in other articles besides mules, does not preclude the recovery of the plaintiff in this cause. Which instruction the court refused to give, but instructed the jury upon all the evidence in the cause, that the plaintiff could not recover, *because he had not shewn either an exclusive direct trade in live stock from Rio de la Plata to Havana, nor an exclusive indirect trade from Rio de la Plata by Martinico, to Havana.*

The plaintiff excepted; and the verdict and judgment being against him, he brought the cause to this court upon appeal, where it was argued before BUCHANAN, Ch. J. and STEPHEN, DORSEY and CHAMBERS, Judges.

MAYER, for the appellant.

The decision in this cause formerly made depended on the case of 4 *Pick.* 429, but in the record before brought up, there was no evidence of an exclusive trade in mules; here an exclusive trade in them to *Martinico* is proved; and a trade in jerked beef and mules from *Rio de la Plata* to *Havana*. The proof also shows, that in 1820, the trade in mules

to *Havana* was more active than since; and that vessels carrying mules generally carry nothing else. There is also in this record, proof of usage, that liberty of a port is a right to trade there, and make it a *terminus* of the voyage. Then the voyage described from its nature indicated the articles to be carried. *Martinico* was one of the points of the voyage, and the underwriter considered the premium to be charged on such enterprises. It was an insurance on cargo, asking a liberty of a port in connection with such cargo. Why use if not to trade? But the proof of usage is clear and positive. *Martinico* then was one—or might be one of the proposed termini of the voyage, and the underwriter was bound to know that mules might be carried. The alternative of carrying live stock to *Havana*, was presented to the underwriter and put him on inquiry. Then under the proof of usage the policy is the same as if it had been to *Martinico* and *Havana*. In effect to either or both ports. In point of law, then they were notified the live stock would be carried, for there was no other article of trade common to both ports from the *Rio de la Plata*. *Marsden vs. Reid*, 3 *East*. 572, a voyage to several ports is a voyage to one or all of them; but if she proceeds to more than one port she must visit them in the order named, *Kane vs. Columbian Insurance Company*, 2 *John*. 264. *Houston vs. New England Insurance Company*, 5 *Pick*. 89. *Hale vs. Mercantile Marine Insurance Company*, 6 *Pick*. 172. The underwriter must take notice of the course of trade—facts in connection with it are presumed to be in his knowledge. If he desires more information he must seek it. He is not merely to be passive and act exclusively on the facts presented by the order to his consideration. *Allegre's adm'rs vs. Maryland Insurance Company*, 2 *Gill and John*. 160. 1 *Pet. S. C. Rep*. 159. *Maryland and Phoenix Insurance Companies vs. Bathurst*, 5 *Gill and John*. 227, 228. In this voyage the underwriter took the risk of the fact that the second port, *Martinico*, might be used to trade at, 2 *Phil. Ins.* 80, 85 to 88.

Again the court below erred in not submitting to the jury

the question of the increase of risk between a live and dead cargo. The materiality of that increase was for the jury. On the materiality of concealment it is competent for the assured to show that an adequate premium was paid. Every case where a policy is sought to be avoided on the ground of increased risk, depends on its own peculiar circumstances. Judicial knowledge does not extend to this, and we have lost the right of argument before the jury from the mode in which they were instructed.

D. STEWART, for the appellee.

The case of *Allegre's admr's vs. Maryland Insurance Company*, in 2 *Gill and John*. 162, declares that a policy on cargo will not cover live stock, and requires a disclosure to the underwriter to extend its operation. The question now is, whether the course of trade will affect the underwriter with notice, and leave him liable to its consequences. The general meaning of the term cargo, excludes the company from liability for live stock. The company relies on the general rule. The plaintiff must show himself within the exception, the burthen of proof is on him. He must establish the course of trade—*Rio de la Plata* is the beginning and *Havana* the end of the voyage insured. Is there evidence in the cause which can bring to the underwriter, at the time of the inception of the contract, such a notice as is equivalent to notice to him of the actual voyage in contemplation at that time? The appellee finds this in the right to go to the port of privilege, *Martinico*. He had a right to go there, but that right must be consistent with the objects of the main adventure. Such is the American law. The liberty is subordinate to the main adventure. 1 *Mar. Ins.* 191, 192. The order of the voyage which the parties contemplated, on which the vessel set out, was for *Havana*. It was to that port in fact and in contemplation of law; and there is no proof of exclusive trade in live stock between *Rio* and *Havana*; and consequently, the exception relied on is not established as to what constitutes an exclusive trade, in *Parker, et al vs. Jones*,

13 *Mass.* 177. The cases in 2 *John.* 254, and 5 *Pick.* 89, decide that the particular order of ports as stated in the policy need not be followed. They are cases on the point of deviation, and decide that a port of privilege may be avoided, not that it enlarges the ordinary effect of the policy; nor that it is a *terminus* of the voyage—again, the exception on which we rely calls for an exclusive trade, as distinguished from a casual or accidental trading.

MERIDETH, further for the appellee.

The counsel for the appellant misapprehends the opinion of the court on the *second* appeal. The court will find in that some little variety in the evidence, but it does not affect the principle decided by this court. It stands as it did on the last appeal. To show this it may be necessary to compare the cause, as it was and now is. The nature of the insurance, the voyage and all the matters already stated need not be repeated, nor the several minor points disposed of on the last appeal; one important point was on the effect of the order, standing on the word cargo. The county court before decided the cause in the absence of all proof of usage, whether “cargo,” excluded or included live stock. They placed themselves on the materiality of the increase of the risk, and a concealment fatal to the risk. *Allegre’s adm’rs vs. Maryland Ins. Co.* 2 *Gill and John.* 144, and put the case to the jury on those questions. The argument now used, that the underwriter was bound to look to the course of trade was used then; and the court said, they must look to the whole voyage. The underwriter was bound to know the course of trade—and that a cargo of live stock might be carried.

But when we look to the points decided by the court, we see that the word “cargo,” did not cover live stock. The nature and character of live stock as cargo was considered, and the right of the underwriter to know that a cargo of live stock was intended to be transported, sustained. The exceptions are founded on a known usage, that cargo shall com-

prehend live stock when the contract was made, or upon an exclusive trade in live stock on the voyage insured. These bind the underwriter. Then why did the cause go back before? Because evidence of a usage of trade that cargo covered live stock was offered and rejected by the court.

The construction of the order followed the general principles of insurance, and put on the reason and authority of the case from 13 *Mass.* on the former trial, the proof showed an exclusive trade in live stock from *Rio* to *Martinico*, and an occasional trade in those articles to *Havana*. But the underwriter is only bound to look to the course of trade on the voyage from *La Plata* to *Havana*,—to regard the termini and not the intermediate port,—the course of trade on the voyage described in the order.

Does the additional evidence now in the cause enlarge the liberty at *Martinico*? It declares that liberty to touch means to trade. The American cases show that it is a liberty to trade, provided it produces *no* delay, in which event it discharges the underwriter. 1 *Phil. Ins.* 203. I contend now that the court before had the same evidence of usage as now, the point, that liberty to touch was to trade, was fully argued. It is re-argued that the underwriter must know the result of this liberty. This was conceded in the cause before. The underwriter is bound to look to the order, policy and course of trade in connection with it. This order is not in the alternative. It was not to *Martinico* or *Havana*—perhaps *Havana*, but describes a voyage to *Havana*. The trade which the underwriter was bound to know, was from *Rio de la Plata* to *Havana*, or to *Havana via Martinico*; not from *Rio* to *Martinico*, as the ultimate *terminus* of the voyage. The opinion of the court below, was in conformity to the decision of this cause, as before reported. We admit that an underwriter is presumed to know the course of trade which he insures. The voyage gave a liberty to touch, what inference is he bound to make from this liberty? He is bound to believe that the assured would make a whole voyage, not a part and subordinate part. The vessel had in fact given up the liberty.

All his papers show a direct voyage to *Havana*; she designed to abandon the liberty, and although it was the real voyage then being prosecuted, the assured turn round and plant themselves on the order, giving it a construction to bring it within the exception opposed to their real designs.

We contend also, that as no return premium was asked for, that the assured always contemplated going to *Havana*, and never considered *Martinico* as one of the *termini* of the voyage. *Hughes on Ins.* 137. 1 *Phil. Ins.* 174.

The circumstances and course of the voyage described in this order, were not calculated to awaken inquiry on the part of the underwriter, and so prevent his charging the assured with concealing the fact that live stock was to be carried. The order could not induce the underwriter to suppose that an alternative voyage to one of two ports was intended; but on the contrary, the underwriter supposed the voyage was not to terminate at *Martinico*, which fact answers all the cases founded upon contingent *termini*, as where various distinct ports of destination were mentioned. 3 *East.* 573. 5 *Pick.* 89. 2 *John.* 283. It is true a voyage may terminate at an intermediate port; if the assured pleases the risk may end there. 28 *Serg. and Low*, 22. The risk ends where the voyage is given up. 1 *Phil. Ins.* 174. But the volition of the assured in terminating his voyage, cannot create a presumption against the underwriter; he cannot anticipate it, nor be presumed to look to it; his calculation is, that the whole voyage will be performed; he presumes it from the payment of the first premium; and if intermediate ports of *termini* are not intended to be used as set forth the policy does not attach. 1 *Mar.* 324. Moreover, this policy in terms only attached upon the cargo shipped at *Rio de la Plata*, and not the cargo laden at a succession of ports. *Hughes*, 127, 128. 1 *Taunt.* 463. 1 *Phil. Ins.* 70. 2 *Phil. Ins.* 60. The usage relied on does not change this view of the case. The usage shows that *liberty* means a right to *trade*, and so is the proof. But then this is restricted by the terms of the policy. Usage does not counteract the express provisions of a contract. Its explicit

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terms prevail. 1 *Phil.* 14, 17. This court has said that the underwriter must look to the *termini* of the voyage and decided affirmatively, that an exclusive trade in live stock from *Rio* to *Martinico* will not do. It must be an exclusive trade to both ports. That the underwriter was bound to look to the course of trade on the voyage insured—and the decision of the court below was in strict conformity.

Upon the second point of the appellant, as to error from the materiality of the increase of risk not being submitted to the jury. The court decided that the term cargo did not generally cover live stock, as they increased the risk, and underwriter not bound unless previously informed of the risk; there was nothing for the jury. Increase of risk was no longer an open question.

Upon the whole there was no circumstance which called the attention of the underwriter to the course of trade between *Rio* and *Martinico*. The voyage was not to terminate, nor the cargo to be changed there. All circumstances induced the belief that it was a direct voyage to *Havana*. At *Rio* the assured determined to go there. What then was the object of the liberty? It was incumbent on the assured to announce that. It was not to trade, nor to terminate the voyage, nor to exchange the cargo. His object was to procure a clearance from a neutral port. The meaning of the term cargo being ascertained, the conclusion is, that the object of the assured in using it was not consistent with fairness, to divert attention from the cargo intended to be shipped. Where the policy discloses the voyage, yet if the circumstances connected with the application are calculated to mislead the underwriter, the policy is void. 1 *Mar.* 322. A policy literally true, if calculated to induce a false conclusion is void.

GLENN for the appellant in reply.

The case is free from fraud. The property shipped is fully equal to the valuation. The questions to be now decided are essentially different from those formerly presented for determination in this cause. The usage and proof of trade is new.

The proof of exclusive trade in mules to *Martinico* is a new fact. The only point decided before was that the word cargo did not include live stock except under particular circumstances; we now establish by proof that liberty of *Martinico* was a liberty of trading and terminating the voyage there, of selling all the cargo there, or of selling none of it there. The effect of a course of trade is the same as an express declaration on that subject. This, with the order, announces the intent to unlade at *Martinico*. It is also notice that the trade is carried on but in one commodity. Both, and each of the parties, are bound to know this. It is equivalent to an express insurance on cargo from *Rio* to *Martinico*. When I ask for liberty to touch, stay, and trade at a port, and but one article is carried to that port, why is it, that the underwriters, bound to know the course of trade, do not know the nature of the cargo composing such enterprises? This is like other risks not ordinarily covered. If a party announces his intent to visit a belligerent port, then the belligerent character of the cargo need not be described. The case of the *Maryland and Phenix Ins. Co. vs. Bathurst*. 5 *Gill and John*. 159, 160. The underwriter may inquire and demand a warranty, and should not let the voyage go on, and after a loss set up his own default as an excuse for not paying. This is a case of construction in which we are to look at the policy and order, interpreted by the usage proved in the cause, and as if it had been incorporated in the order and policy. The prayer presents a question of construction, and nothing else. The order is for whom it may concern; it may cover belligerent risks. It is from the *river Plata* which covers any port on that river. It is with a liberty, what does that include? It is a general liberty—nothing restrains it. It is not a special liberty as to do a particular thing, or use the port for a particular purpose: but an unrestricted universal privilege to use *Martinico*, for all, and any purpose, as any other port. The usage fixes the meaning of the liberty. If this is not so the liberty is paid for without an equivalent, for the only article in which a trade to the port of the liberty is carried on with, is that

carried on this occasion ; the liberty is to try both markets, and to do this, the assured has a right to carry cargoes suitable to both. Live stock was the only article common to both. We proposed to submit to the court on the proof, that the object of stopping at *Martinico* was to trade, and the counsel now opposed to us are not at liberty to argue here upon that view of the case. If the liberty as expounded by the usage makes an insurance at and from *Rio* to *Martinico* and thence to *Havana*, which brings us within the exception, as proof shows an exclusive trade to one of the ports, if it was a case of alternative destination in terms, its effects conceded. We contend that the liberty set up and established here produces that result.

DORSEY, Judge, delivered the opinion of the court.

The only question discussed in this cause arose as to the effect of the words in the policy, "*with liberty of Martinico.*" with liberty of a port, is a power subordinate to the general course of the voyage.

It does not necessarily import an intention to trade. It may, and ordinarily is granted for other and different purposes. It is not an assurance or intimation to the underwriters, that the assured looked to the port of privilege, under any circumstances, in the contemplation of the parties, as that, at which, the voyage was designed to terminate. Mere awakening circumstances, inciting the assurer to inquiry, are not sufficient to relieve the assured from the necessity of making known to the insurer, the fact that the cargo for insurance consisted of live stock ; as was in effect decided in the case of *Allegre's administrators vs. The Maryland Insurance Co.* 2 *Gill and John*. 136. A knowledge of this fact previous to the execution of the policy must be shown in the underwriter ; or an imputed knowledge by proving that on the voyage insured live stock is the only article of commerce. But it is insisted that a knowledge of the nature of the cargo must be imputed to the underwriters, because they gave the assured the liberty of *Martinico*, which confers the license to trade there. This

position cannot be sustained. It rests on a principle of false logic, universally exploded: It draws a general conclusion from an isolated fact. The grant of a license conferring a power to do a variety of acts, does not necessarily imply the commission of all the acts authorized. Had the design of the assured been, to call at *Martinico* for a clearance, or to obtain supplies necessary to the prosecution of the voyage, or to do any act, or transact at *Martinico* any business, wholly unconnected with the trade carried on between *La Plata* and *Martinico*, the license in such case required, and that in this case granted, would have been identically the same. In requiring the liberty of *Martinico*, the insured did not necessarily notify the insurer, that the object of the privilege was to trade at *Martinico*, and was not therefore an unequivocal intimation of the nature of the cargo. And if we advert to the circumstances attending this insurance, so far from their intimating to the assurers that the cargo was of live stock, the reverse was the natural conclusion to have been drawn from them. According to the decision of this court in the case in *2 Gill and John*. 136, when insurance is demanded on live stock, it is the duty of the assured to notify the assurers of the the nature of the cargo, and his failure to do so vitiates the policy. Of this principle of the law of insurance, the underwriters in this case must be presumed to have had knowledge. From the order for insurance, apart from the liberty of *Martinico*, the necessary inference was, that the thing insured was a dead cargo, and giving to the order of insurance and policy a fair and reasonable legal construction, this inference is not controlled by the privilege granted as to *Martinico*. If the design of this liberty was, as has been urged, to terminate the voyage, and sell the whole cargo at *Martinico*, should the market prove favourable, *Martinico* would have been made one of the *termini* of the voyage; and a proportionate return of premium would have been provided for in the event of the voyage terminating there. Such an omission was the strongest implied intimation that could be given, that the object of the assured in requiring the liberty of *Martinico*,

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was not that now ascribed to it in the argument; and there is nothing in the proof offered which would give to the policy a different interpretation from that, which on its face it purports to bear.

JUDGMENT AFFIRMED.

ANANIAS DIVERS vs. JAMES FULTON.—*December, 1836.*

The defendant having given notice to the plaintiff's attorney, at 4 o'clock, P. M. on Monday the first day of the term, to produce a paper to be read in the trial of the cause, which came on, on the following Wednesday; it was held to be sufficient notice to let in secondary evidence of its contents, though it was admitted that the paper was in the possession of the plaintiff himself, and that the attorney did not see him until the intervening Tuesday, at a quarter past 4 o'clock, P. M.

Before secondary evidence of the contents of a written instrument can be offered, the notice to produce the original must appear to the court to be reasonable in point of time, so as to give the adverse party an opportunity to produce the paper called for.

Where evidence had been offered for the purpose of establishing a parol gift of a negro slave by a deceased testatrix to the plaintiff; and the defendant had read to the jury a letter from the plaintiff to him, written subsequently to the date of the will of the testatrix, inconsistent with the idea of exclusive property in the plaintiff; the defendant was permitted to read the will, though executed after the alleged gift, for the purpose of explaining the plaintiff's letter, and showing his recognition of the right of the testatrix to bequeath the property.

APPEAL from *Harford* county court.

This was an action of *replevin*, commenced on the 13th November, 1833, by the appellant against the appellee, for a negro woman named *Phillis*, and her child, *Lucinda*. Issues were joined upon the pleas of *non cepit*, and property in *Fulton*, the defendant.

At the trial the plaintiff gave in evidence that *Mrs. Martha Amos*, a widow, being possessed as owner of sundry negroes, and having broken up housekeeping some time in the autumn of 1828, placed her negroes with her son, *Joshua Amos*, and

about that time distributed them among her several daughters ; and further offered evidence by *Daniel Amos*, that in the autumn of 1828, some time in the month of September, the said *Martha* told the witness, that she meant, that her several negroes should go to several places ; that negro *Phillis*, (the negro in controversy,) was at that time at the house of *Divers*, the plaintiff, and that there she would stay. That she mentioned to the witness in the same conversation, that the rest of the negroes whom she named as belonging to her, she had placed with her other daughters ; with whom and in whose service they had remained ever since the fall of 1828, until the death of the said *Martha*, which happened in April, 1832 ; and that she owed no debts when she died. And the plaintiff further proved, that in the autumn, 1828, negro *Phillis* left the house of *Martha Amos* aforesaid, with all her clothes and things, in the carryall of the plaintiff, with him and his wife, who was the daughter of said *Martha*, and remained in their service till the death of said *Martha* ; and never was off the farm of the said plaintiff from 1828 until about two days before this replevin was issued, when she went to the house of the defendant, of whom the plaintiff demanded her, but the defendant refusing to deliver her, this replevin was issued. The plaintiff here rested his case, having first admitted that the defendant was the administrator of the said *Martha Amos*, duly constituted, appointed and qualified according to law. And thereupon the defendant to maintain the issue on his part, offers in evidence and read to the jury, the following note or letter of the plaintiff.

“MR. JAMES FULTON,

Philas is in sarch of a master, as shee cant serv three at wounst, she wants to stay in the family. I am willing to take forty dollars for my shear of here, or I will give forty, if she is willing to stay with me. I am willing to give here that chance.

ANANIAS DIVERS.”

April 24th, 1832.

And then offered to give in evidence the contents of a paper writing, purporting to be a petition to the Orphans

court of *Harford* county, filed in said court by the said plaintiff, on the 17th day of April, 1833, having first proved, and it being admitted that notice to produce the original petition, or paper, was given by the defendant to the attorney of the plaintiff at 4 o'clock, P. M. on the Monday before the trial of this cause, the said Monday being the first day of the trial term; but that the said attorney did not see the plaintiff until a quarter past 4 o'clock, P. M. on Tuesday, the next day, when he informed him of said notice, and the trial took place on Wednesday, the next day; it being admitted, that the said original petition or paper writing was in the possession of the said plaintiff. To the admissibility of which proof so offered by the defendant, the plaintiff objected for the want of due notice to produce the original paper; but the court (*Magruder, A. J.*) over-ruled the objection, and admitted the proof of the contents. The plaintiff excepted.

And thereupon the defendant offered evidence by *Samuel Bradford*, who was admitted to be a judge of the Orphans court of *Harford* county, and by *Thomas T. Bond*, who was admitted to be register of wills of said county, that on the 17th April, 1833, a paper was filed in the said Orphans court by the plaintiff himself, who a few days before the trial of this cause, called in person at the office of the said register of wills, and demanded the delivery to him of the said original paper, which original was admitted to be the petition or paper, the production of which on the trial of this cause was required by the notice herein before mentioned, as having been given to the counsel of said plaintiff; and the defendant further offered in evidence by said *Bradford and Bond*, that they refused to deliver to said plaintiff the said original paper until they could take a copy thereof, which was accordingly done by one of them, and which copy was by both of them carefully compared with said original in the presence and hearing of said plaintiff, to whom the said original was then delivered; and which said copy is as follows:

“To the honourable the Orphans court of *Harford* county, we the undersigned, heirs at law of *Martha Amos*, late of

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Harford county, deceased; *Humble* states, that there are sundry negroes the property of the said deceased, which have not been appraised, in consequence of their not having been mentioned in the will of said deceased, and that such property as has been bequeathed is appraised, and an order for sale, which we think unfair, and humbly prays that your honours will countermand said order and grant relief, by directing the administrator to have the property appraised which was not named in the will, to wit: a negro girl named *Mary*, in possession of *James Fulton*, a negro boy named *Harry*, in possession of *Martha McComas*, two negro boys named *John* and *Sandy*, in possession of *Ananias Divers*.

DANIEL AMOS,
AQUILA AMOS,
JOSHUA AMOS,
BENJAMIN S. AMOS,
ANANIAS DIVERS."

This copy was certified by the register under the seal of the Orphans court, aforesaid, to be a true copy.

And the defendant then offered to read in evidence to the jury, the following paper, being the last will and testament of the said *Martha Amos*, bearing date the 2d day of April, 1832.

"Whereas, I, *Martha Amos*, of *Harford* county and *State of Maryland*, hath heretofore disposed of the principal part of my personal estate, and delivered the items to the persons intended by me to possess the same; and the remainder of my property, I wish at my decease to be delivered to the persons as named in the following memorandum, or last will and testament. "That is to say, I give to my three daughters *Martha McComas*, *Hannah Fulton*, wife of *James Fulton*, and *Elizabeth Divers*, wife of *Ananias Divers*, my negro woman, *Phillis*, to work alternately and equally between them, and they to be at equal expense in her clothing and support, and also at equal expense in her support if she should become infirm, or from any cause be rendered unable to labour for them to profit, and each one shall make their election at my

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decease, whether they will take this legacy or donation subject to the incumbrance, and such election shall thereafter be binding on them respectively. And lastly," &c.

The same being admitted to be a duly authenticated copy of said will, duly admitted to probate. But the plaintiff objected to the admission in evidence of the said will, upon the ground, that it was an act or declaration of the testatrix, done or made after the date of the alleged gift or distribution of the said negro *Phillis*, herein before given in evidence. But the court over-ruled the objection, and received the will in evidence. The plaintiff excepted; and the verdict and judgment being against him he appealed to this court.

The cause was submitted on notes to the court, BUCHANAN, Ch. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

J. D. MAULSBY for the appellant.

This is an action of replevin from *Harford* county court for a negro women named *Phillis*, and her child, *Lucinda*, tried at the March term of that court, 1835.

The plaintiff (*Divers*,) claimed the negroes, as a gift from *Martha Amos*, to her daughter, the wife of the plaintiff.

There were at the trial several exceptions taken, which are to be found in the record; all of which, except one, are submitted without remark.

The objection of the plaintiff is to the admission by the county court of the will of *Martha Amos* (the donor,) to be read in evidence by the defendant to the jury without any direction whatever, qualifying the evidence or specifying the purpose for which alone it might be regarded by the jury as evidence.

The plaintiff having offered evidence of the gift of the negro woman, and of his continued possession under that gift, the defendant offered the will of the said *Martha*, (the donor,) in which she otherwise disposed of the negro woman, and the objection of the plaintiff is: that although acts of ownership

by *Martha*, after the gift, might have properly been given in evidence, yet that new *declarations* made by her, ought not to have been admitted.

The will was admitted by the court to be read, without any qualification whatever, and to this the objection of the plaintiff particularly applies. The will must be regarded, not only as the *act*, but the *declaration of the donor*, made after the alleged gift.

It has been so often decided, and is now so well settled, that the *declarations* of a donor, made subsequent to the gift, are not evidence against the donee, as between the *parties themselves*, or their representatives, that it is not deemed necessary to refer to authorities. The questions, therefore, involved in this case, are respectfully submitted.

O. SCOTT for the appellee.

The will of *Martha Amos*, it will be perceived was offered in connection with two papers signed by the appellant. The first, a written proposition to purchase *Phillis*, the negro in question, and stating that she could not serve three at *one time*. The will shows what is meant by three at once. The negro, by the will is devised to three persons, one of whom is *Divers'* wife.

The other paper is a petition to the Orphans' court, requesting that the administrator may appraise the negroes therein named. This paper refers to the will, and states that the reason that the negroes were not appraised was, that they were not named in the will. Connected with these papers, the will was proper evidence. It was necessary to explain what *Divers* meant, by the phrases, "*three at once*" and *his share*."

STEPHEN, Judge, delivered the opinion of the court.

In the course of the trial two opinions were delivered by the court below, to which the appellant excepted, and which the appeal in this case brings before this court for examination. They both relate to the admissibility of evidence, and

the question raised upon the first bill of exception is, as to the sufficiency of the notice given to the plaintiff's attorney, to produce at the trial a paper in the possession of his client, to warrant a resort to secondary evidence of its contents, upon the failure or omission to produce it, at the trial in pursuance of such notice. We think the court below were clearly right in the opinion expressed in the first bill of exception. The notice was given to the attorney of the plaintiff at four o'clock on Monday; he communicated the fact to his client on Tuesday, and the trial of the cause took place on the following Wednesday.

This, we think, was a sufficient notice to entitle the plaintiff to use the secondary evidence, upon the defendant's failing to produce the primary proof called for. It is true before secondary evidence of the contents of a written instrument can be let in, the notice to produce the original must appear to the court to have been reasonable in point of time, so as to give the adverse party an opportunity to produce the paper called for; but we think, that this rule has been complied with in the present case. In *Roscoe on Ev.* 6, we find that a notice to produce a letter, served on the attorney of the party on the evening next but one before the trial, was ruled to be sufficient, though the party was out of *England*; the presumption being, that on going abroad the party had left with his attorney the papers necessary for the conduct of the trial. We think that the court below were also correct in the opinion-expressed in the second bill of exceptions, as the copy of the will offered in evidence was clearly admissible, as explanatory of the note written by the plaintiff to the defendant, in which he offers to sell his share of *Phillis* to the defendant, as she could not serve three at the same time. By the will it appears, that the negro woman called *Phillis*, was given by their testatrix to her three daughters, of whom the wife of *Divers* the plaintiff was one. This bequest it was, to which he evidently alluded when he said she could not serve three at the same time. We therefore think, that taken in

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connection with the letter of the plaintiff to the defendant, *Fulton*, who was the administrator of the testatrix, the will was legally admissible to go to the jury, for the purpose of showing his recognition of the legal validity of the bequest therein contained to his wife, and her three sisters. Finding no error in the opinion expressed by the court below in either bill of exception we affirm their judgment.

JUDGMENT AFFIRMED.

SAMUEL MARFIELD vs. JAMES DAVIDSON.—*December, 1836.*

Where a party had offered evidence, without objection of the consideration, amount, dates, and times of payment of two promissory notes, (not before the court) and then proposed to prove, that they had been surrendered to the drawer, the one upon being paid, and the other upon being substituted by two other notes given in lieu of it; upon objection to the proposed proof of the surrender, because they were not produced, and no notice had been given to produce them; *held* that the proof was admissible. *Held* also, notwithstanding a similar objection, that evidence of the substitution of the two last notes, for the one surrendered was likewise admissible.

To render the evidence of the surrender admissible as a general rule, the notes surrendered must have been produced, but where their contents are proved by consent, the identity of the notes given, and those surrendered, is as certainly established, as if they were present in court.

The admissibility of the proof of the substitution rests upon the same principle, that is, that evidence of the contents of the substituted notes, had been given without objection.

APPEAL from *Baltimore* county court.

This was an action *replevin*, brought on the 3rd January, 1834, by *Samuel Marfield* against *James Davidson*, for a negro boy, called *Jacob Hill*. The defendant pleaded *non cepit*, and property in himself, on which issues were joined.

At the trial of the cause, the plaintiff offered in evidence, that he sold the negro boy whom this action was brought to recover, to *Elisha Lupton*, on the following terms, to wit: that the said *Lupton* was to take the boy into his possession

immediately, but that no title, or interest, was to pass to him, but was still to remain in the plaintiff, until the whole purchase money should be paid; that the amount of the purchase money was \$225, which was secured by two promissory notes given by the said *Lupton*, bearing date about the 7th April, 1834, one of which was payable in *sixty* days, and the other in four months after date. That the first of said notes was taken up at maturity by said *Lupton*, who paid a small sum in cash, and gave two promissory notes in part renewal of, and in substitution for the said second note, which was then delivered up to him, and the said two substituted notes delivered to said *Marfield*, and by him retained for the balance due to him for the said negro boy by the said *Lupton*. That said two last mentioned promissory notes were due, at and before the impetration of the original writ in this cause, and are yet unpaid. It was also proved that *Lupton* has resided for some time past out of the *city of Baltimore*, in the town of *Cumberland*, in *Allegany county*, whereupon the counsel for the defendant objected to the competency of the evidence, above given in relation to the surrender of the said two first notes, to the said *Lupton* by the said *Marfield*, as no notice had been given to defendant to produce said notes, nor any effort made to obtain them from the said *Lupton*; and also objected to the competency of the evidence in relation to the giving of the said two last mentioned promissory notes, a part renewal of one of the first notes for the same reason, that the said two first notes were not produced, nor any notice given to the defendant to produce them. And the counsel for the defendant, also prayed the court to instruct the jury, that the plaintiff was not entitled to recover, which objection and prayer being sustained, and granted by the court, the plaintiff excepted and brought this appeal.

This appeal when called, was affirmed *nisi*, but afterwards was submitted to BUCHANAN, Ch. J. and STEPHEN, ARCHER, CHAMBERS and SPENCE, Judges, upon the notes of the appellant's counsel.

DULANY, who contended, that no objection was taken to the purpose for which this evidence was offered, but as the court will perceive by reference to the bill of exceptions, two objections were made, both of which related to the competency of the proof.

1st. It was said, that although it had been proved that the two first notes had been surrendered up to *Lupton*, by whom they had been given, yet that this proof could not be received as competent to establish that fact without the adduction of the notes themselves, or a failure to produce them on the part of *Davidson*, the defendant, after due notice.

2d. That the two last promissory notes which were due and unpaid, and given for the balance of the purchase money of the boy, and which were held by *Marfield*, could not be adduced in evidence, and were incompetent for any purpose, because the two first promissory notes were not produced or their absence accounted for, in any other manner than by their having been surrendered to *Lupton*, the maker.

The great difficulty in this case is to find out the subject of dispute, the learned judge who tried the cause, observed that the two first notes constituted a link in the chain of evidence, without which no progress could be made in the cause, but of what one fact necessary to the recovery of the plaintiff they were the best evidence, and which could be established by no inferior proof was not intimated, nor can I perceive it.

All that it was necessary for *Marfield* to establish, after the explicit proof which had been given of his contract with *Lupton* by a witness who was present, was that the purchase money for the boy had not been paid, this he attempted to do by producing two notes of *Lupton's*, proved to be for the balance of the purchase money, which were past due and unpaid, at the time he issued his writ in this cause. This completely made out his case, for it showed that the title to the boy was still in him and had never been conveyed away, for the payment of the whole purchase money was a condition precedent to the passage of the title to *Lupton*.

Why then was it necessary to produce the two first notes, they formed no part of the evidence of the agreement; that was *verbal*, and all its terms expressly proved orally, by a witness who was present. The notes were afterwards given in pursuance of and in execution of the contract; they were intended merely to secure the purchase money, the amount of which had been independently agreed upon, as well as all the other terms of the agreement. If the first notes had been present at the trial they would have manifested no material fact, but their own existence as instruments, then of no value, which had been in part paid, and in part superseded by the substitution of new notes, having as evidence an effect equivalent to their own. If *Lupton* had produced the first notes upon the trial of the cause, they would have given rise to the *presumption* that he had paid the whole purchase money, and this would have been the only effect of his possession of them. But can it be denied that this presumption might have been rebutted by the proof that although they had been surrendered, yet were they not paid, but that new notes were substituted in their place, and how can it be contended that if their presence and the possession of them by *Lupton* would have created a presumption merely, that might have been destroyed by the proof actually offered, that they were nevertheless better than that proof. This would surely be absurd, for the test of the best evidence is this, that if adduced it could not be *contradicted* by the evidence offered.

One thing is clear, that the two first notes constituted no part of the original contract between the parties, that contract in all its parts, was verbal, if then these notes are material evidence of any thing, they must relate to some fact connected with the execution of the agreement, in which case as instruments of evidence they possess no superior authority.

Parol extrinsic evidence, says *Starkie*, is admissible to prove a fact, by virtue of its own weight, notwithstanding the casual existence of collateral written evidence to prove or disprove the same fact, unless the written instrument or evidence be by *law* a *contract*, constituted the *sole* medium of

proving the fact. 1 *Starkie, Ev. 2d ed.* 329, 390. 2 *Starkie, 2d. ed.* 570. This principle applies in general, when the document contains a mere subsequent memorial and recognition of the fact. 2 *Starkie, 2d ed.* 571. 7 *Law Rep.* 335. 4 *Esp. C.* 13.

If then the court were wrong in deciding that the evidence offered by the appellant in the manner stated in the bill of exceptions, was incompetent and could not be received, they were certainly not right in instructing the jury that he was not entitled to recover.

ARCHER, Judge, delivered the opinion of the court.

The plaintiff had offered in evidence without objection, that *Lupton*, who was proved to be the purchaser of the boy in controversy, had for the purchase money given two promissory notes; he also gave in evidence, the date of the respective notes and the times when payable, all without objection; and then offered to prove the surrender up of these notes. The one in consequence of payment, and the other in consequence of the substitution of two other notes which were due at the time of the institution of the suit and then unpaid.

To the evidence of the surrender of the two first promissory notes objection was taken because they were not produced, and no notice had been given to produce them.

To the evidence of the substitution of the two last notes for one of the surrendered notes, objection was likewise taken for the same reason.

The court held both objections to be valid and excluded the evidence.

The plaintiff having offered evidence without objection, of the amount, dates and times when payable, of the two first promissory notes, and the consideration for which they were given, no objection could be urged to the admissibility of evidence in relation to the surrender as a fact, than could have existed against such evidence, had the notes been actually produced. Evidence had been permitted to go to the jury, which dispensed with the necessity of producing the

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notes or of giving notice to produce them. To render the surrender, evidence, the notes in general would have to be produced, because the witness could not speak of them until they were before the court and jury, and because their identity could alone be established by their production. But here they are by consent offered to the jury, and their contents proven by consent; and being so proven, the identity of the notes given, and the notes surrendered, are just as certainly established, as if the notes were present in court; we therefore think, the court were in error in rejecting the evidence of the surrender of the two first notes.

The same principles will likewise render admissible the evidence offered of the substitution of the two last promissory notes for the unpaid note.

The plaintiff had given evidence of this unpaid note without objection, and having done so, it was in our opinion competent to prove the consideration of the two last notes, by establishing the fact, that they took the place of the note he had by consent proven to exist.

On the right of the plaintiff to recover in this action, we express no opinion, the prayer being general—see act of 1825, ch. 117.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

FRANCIS MARSHALL vs. THE MAYOR AND CITY COUNCIL
OF BALTIMORE AND OTHERS.—*December, 1836.*

Appeals from orders dissolving injunctions not prosecuted under the act of 1832, ch. 197, will not lie.

APPEAL from the court of *Chancery*.

On the 16th December, 1834, *Francis Marshall* filed his bill on the equity side of *Baltimore* county court, praying for an injunction to stay the corporation of the city of Baltimore,

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its commissioners and officers, from proceeding to execute the act, for opening and increasing the width of German lane, in the city of Baltimore, which in the mode of its proposed execution encroached upon his freehold and improvements on German street. An injunction issued accordingly, and after answers filed, the cause was removed upon suggestion and affidavit to the court of Chancery, where BLAND, chancellor, on the 20th January, 1835, dissolved the injunction, and the complainant prosecuted the present appeal.

At this term, Campbell for the appellees moved to dismiss the appeal.

The motion was argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, DORSEY and CHAMBERS, Judges.

CAMPBELL for the appellees :

Stated that the order dissolving an injunction was interlocutory merely, and not the subject of an appeal. *Snowden, et al vs. Dorsey, et al* 6 Har. and John. 114. *Roberts, et al vs. Salisbury, et al* 3 Gill and John. 434. *Dorsey vs. Smith, 2 Har. and Gill.* 135. After the dissolution of this injunction, Marshall applied to one of the judges of the court for permission to appeal, which was refused him ; and without the *alligatur* no appeal lies. The act of 1832, ch. 197, settles this question. It introduced a new rule. It allows appeals from such orders on terms, which do not exist in this case.

MAYER for the appellant contended :

That this appeal was not within the principle of the cases respecting injunctions cited for the motion to dismiss. That it was within that of *Williamson vs. Carnan*, 1 Gill and John. 184. The order appealed from was in effect a formal decree. It was like the case of closing up a road. Looking to the consequences of the order, the injury was remediless, and the appeal was a repetition of the case of *Thompson vs. McKim*, 6 Har. and John. 302, 327. The decisions relied on, were not appeals from practical orders of the chancellor, they looked to no execution, but were the immediate practical effects of

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the dissolution, affects the appellant's interests, and no future intervention of chancery could give him redress. The counsel has confounded the final character of these orders; they consider they must be final in their form and language, but it is only necessary they should be final in their effect and action.

This order is final in its nature, it permits the street to be opened, enlarged, widened, and the property of the appellant to be taken, which brings it within the case of *Thompson and McKim*, and the acts of the legislature. The distinction between orders which look to execution and those merely speculative, reconciles all the cases. Here the appellant's house was to come down, no compensation could make redress or restore the houses. And what difference is there between an order which commands a street to be opened, and a dissolution of an injunction which permits it to be done under colour of legislative sanction. The answers here admit the bill, and really there is nothing but a question of law upon the construction of the act of assembly. The complainant has nothing to prove, and this appeal must present the precise same question, if now heard, as upon final decree. The cause is not within the act of 1830, ch. 185, nor its provisions. It is introductory of no new law as respects this cause. It looked to certain cases in which appeals were to be stayed, and this is not one of them. The act of 1832, ch. 197, is merely cumulative.

R. JOHNSON, in reply.

There are two grounds for this motion to dismiss.

1. Independent of the act of 1830, the order appealed from was not final.

2. If a final order the appeal is taken away by the act of 1830.

The counsel has misconceived the grounds of the opinion of the court in the two cases cited, in supposing that an appeal lies in every case, if the court supposes irreparable injury is about to result.

1. He is mistaken as to the meaning of irreparable injury.

2. A mere irreparable injury is not the foundation of an appeal unless caused by a final decree.

This court refuses an appeal from the court of Chancery, when the decree rests in the breast of the Chancellor, and is liable to be changed at any time. This doctrine is affirmed by the case of *Smith and Dorsey*. What irreparable injury is there here? In *Thompson and McKim*, that sort of injury means without any redress at all *upon the principles assumed by the decree*. What is the irreparable injury here? Damages have been decided upon by a jury, and over them you have no jurisdiction. The only irreparable injury here is the assertion of the legal right to open the street, and if this has been erroneously assumed, upon the ultimate decree damages may be recovered. In this case, if irreparable injury be what it is argued to be, the refusal to grant the injunction would give a right of appeal. The refusal to grant, and the granting might be attended with like consequences.

The irreparable injury must flow from an order finally settling some right of the party appellant, and this is the meaning of the court in the case of *Thompson vs. McKim*. The general rule is that no appeal lies from an interlocutory order, and the object of the act of 1830, was for the very purpose of preventing appeals in such cases as *Thompson and McKim*, and *Williamson vs. Carnan*. They were to be stayed until final decision. The act of 1830, is in terms a legislative prohibition on this appeal, and the act of 1832, concedes that no appeal would lie, and was passed in some measure to qualify the general rule embraced in the act of 1830, and authorizes an appeal when allowed by one of the judges. In either view this motion ought to prevail.

DORSEY, Judge, delivered the opinion of the court.

The present appeal has not been prosecuted under the act of 1832, ch. 197. The right of the appellant to sustain it stands wholly unsupported by any legislative enactment upon the subject. It is a matter of surprise, therefore, that such an appeal should have been brought before this tribunal, since

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its determination in the case of *Dorsey vs. Smith*, 2 Har. and Gill, 135, in which the court say, they take this occasion to declare, that they are unanimously of opinion that such appeals will not lie, and that they will consider them an abuse of the right to appeal, and will censure them accordingly.

APPEAL DISMISSED WITH COSTS.

JAMES JENKINS vs. JAMES P. WALTER.—*December, 1836.*

Though this court feels itself bound to shield a trustee, in the honest and faithful discharge of his duties, it is also bound to exercise a vigilant care in protecting the interests of those who, from their tender years are incapable of protecting themselves.

Thus where a guardian had received a sum of money belonging to his ward, and on the day of its receipt, had deposited it in a banking institution then in good credit, but which subsequently failed, and taken a certificate therefor payable to himself, or order; it was *held*, that the loss resulting from the failure of the bank should fall upon him, though on the day of the deposit, by endorsement on the certificate he declared it to be the property of his ward, and placed in bank for his benefit.

If in such a case the party making the deposit had failed before the bank, the money deposited would have enured to the benefit of his creditors, and the ward must have sustained the loss; and although the exhibition of the endorsement on the certificate might have defeated the claims of creditors, the bank itself might have applied the fund in satisfaction of any claim due it from the depositor.

Quere, whether the guardian would have been protected, if without the sanction of the Orphans' court, he had deposited the money in the name of his ward.

APPEAL from the Orphans' court of *Baltimore* county.

On the 23d August, 1836, *James P. Walter* filed his petition in the above court, charging that during his minority, the appellant as his guardian, had received his property and settled several accounts with said court, that since the petitioner had come of age, he had demanded the balance due him, and he had not been paid. Prayer for an account and relief.

The appellant by his answer, admitted the guardianship,

that he had settled accounts; and that on the day of his receiving a sum of money in which his ward was interested, (with two other of his wards,) he deposited the same in the *Bank of Maryland*, at an interest of five *per centum per annum*, and received from said bank a certificate of said deposit, on which said certificate he endorsed on the same day the words following, "The within \$907 85 is the property of *James P. Walter, Joseph A. and Sarah Walter*, and placed in the *Bank of Maryland* for their benefit, *Baltimore*, August 13th, 1832," and signed his name thereto; that he afterwards obtained interest on said deposit, and stands charged therewith in his accounts settled with this court; that in the month of March, 1834, the said bank failed, and conveyed its whole estate to trustees for the benefit of creditors; that when the appellant made said deposit said bank was in high credit, and generally believed to be solvent and perfectly secure, and both before and after his deposit, was the selected place of deposit by this court; that he was advised not to part with said certificate, and still holds a certificate therefor, and that the petitioner knew his money was in the *Bank of Maryland*; that he is ready to pay the appellee's portion of said deposit in *Bank of Maryland* funds or notes, and submits to the court whether he is chargeable in any other mode.

The guardian's accounts settled with the Orphans' court, charged the appellant with so much cash generally; the certificate of deposit granted by the *Bank of Maryland*, on the day the guardian received the fund in controversy, was payable to *James Jenkins*, or order, and endorsed as follows:

"The within \$907 85 is the property of *James P. Walter, Joseph A. Walter, and Sarah A. Walter*, and placed in the *Bank of Maryland* for their benefit. JAMES JENKINS,
Baltimore, August 13th, 1832. Guardian."

There were also some endorsements of interest paid the guardian. It was in proof that before the failure of the bank, the guardian had exhibited this certificate thus endorsed for the purpose of showing that the fund belonged to his wards, and it was admitted that the bank before its failure was a depository frequently selected by the Orphans' court.

The Orphans' court (*Harwood, Payson, and Ridgate,*) decreed that the guardian should pay the balance due his ward with interest, until paid, from which decree the said guardian appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

D. STEWART, for the appellant contended :

That the evidence showed, that *Jenkins* deposited the funds in his hands as guardian in the *Bank of Maryland*; that the money deposited was the ward's. In case of accident to *Jenkins* upon this proof, his executor would have been a trustee for *Walter*. At the time of the deposit he endorsed the certificate as his ward's. His acts and declarations contemporaneous with this deposit show, that he had segregated it from the mass of his property, and marked it, as belonging to his ward. The responsive character of the answer, and the direct nature of the proof fully show this, and there is no countervailing evidence. It is said however, that the deposit was made without authority, and upon the responsibility of the guardian. The record shows that the *Bank of Maryland* was a favourite depository of funds, under the control of the Orphans' court of *Baltimore* county. How far then can a guardian be charged with loss, because of no application by him to the court. No application is required in such cases for the act of 1798, sub ch. 12, sec. 13, looks rather to the guardian himself as a depository, and in this case he acted *bona fide*. I contend that if on application to the court, they would have ordered it to be made at five per cent. in the place selected by the guardian, and as he has acted with good faith he is not to bear the loss arising from the insolvency of the bank. The court will consider the act done, as having their sanction, when they would have so ordered had application been made. *Lee, et al vs. Stone and McWilliams*, 5 *Gill and John*. 19. All the guardian wants

here for his perfect protection is the form and ceremony of a judicial order ; and the court will award him that, when they see that all else was rightly done, and would have so ordered had a request been submitted, and he is not to suffer from misapplied confidence. 2 *Ves. Sr.* 241. *Rowth vs. Howell*, 3 *Ves. Jr.* 565. 3 *Bro. C. R.* 434. There is not the least evidence that the guardian mixed their funds with his own. On the day of their receipt they were deposited in the bank, and so remain now. And as the guardian has behaved throughout with the most perfect good faith—never endeavoured to reap any advantage from their funds, but prudently deposited them as he would have deposited his own funds, in an institution in high credit, and believed to be solvent, he ought not to suffer. *Bank of Maryland vs. Ruff, et al, ante.*

JOHN SCOTT, for the appellee contended :

That the decree below was right ; that the guardian deposited the money in his own name, payable to his own order, to get a credit for himself with the bank, and in the settlement of his accounts with the Orphans' court charged himself *six per cent.* interest, when in fact he was only receiving *five per centum*, for which he had some motive personal to himself. That the endorsement on the certificate, declaring the funds deposited to be the property of his ward was not made at the bank, but the money deposited in his own name, there to gain a credit with the bank, and subsequently endorsed to save himself harmless. Under such circumstances it cannot be considered that the wards' money was deposited in bank. If *Jenkins* had intended this as a guardian's deposit, nothing was easier for him than to have had it so entered on the books of the bank, and face of the certificate. The ward is not affected by the guardian's subsequent acts and declarations. It results that this deposit was made without authority, and the guardian must bear the loss. Trustees are not to act contrary to law, they are presumed to know the law, and this defendant should have acted under instructions from the proper tribunals.

STEPHEN, Judge, delivered the opinion of the court.

This is an appeal from an order of the Orphans' court of *Baltimore* county, directing the defendant, *James Jenkins*, the late guardian of the appellee, to pay to him the sum of \$490 84 with interest thereon, from the 28th March, 1836, until paid. A part of this sum was deposited in the *Bank of Maryland* by the guardian of the appellee, on the day he received it from the executor on his ward's account; the bank at that time being in high credit and in prosperous circumstances. The deposit however, was made and the certificate taken in his own name, and no communication was made to the bank at that time, that the money deposited was trust property. The bank was to pay for the money deposited an interest of *five per centum per annum*. On the certificate of deposit an endorsement was made, that the money deposited was the property of the appellee, but the fact of such endorsement was not at the time disclosed to the bank, and the appellant appeared upon the books of the institution to be the absolute proprietor of the sum deposited; and it does not appear that in his settlements with the Orphans court he ever communicated to that tribunal, that in making the deposit he acted in his fiduciary capacity, until the failure of the bank took place, in the year 1834. In his second account settled with that court, it appears he charged himself with an interest of *six per centum per annum*, upon the amount of his ward's property in his hands, including the sum so as aforesaid deposited. Upon this state of facts the question arises, upon whom the loss arising from the failure of the bank is to fall? Is it to be borne by the ward, or ought the guardian to be held responsible for the consequences following from the ultimate insolvency of that institution?

According to the decision of the court below, the loss arising from that contingency is to be visited upon the appellant, and from that decision an appeal has been taken to this court for its revision, so that if erroneous, the error may be corrected. Although, in this transaction there may have been the most upright intention, and perfect good faith on the part

of the guardian in making the deposite, still we are constrained to say, that we think the decision of the court below was correct, and that it ought to be affirmed. At the same time that this court feels itself bound to shield a trustee from harm, in the honest and faithful discharge of his duties in his fiduciary character, it is bound studiously to exercise a vigilant care in protecting the interests of those who, from their tender years, are incapable of protecting themselves. No principle seems to be better settled than that in such a case as this, any loss arising from a misplaced confidence in the solidity of a banking institution, or other depositories of trust property must be borne by the trustee, and not by his *cestui que* trust. By making the deposite in his own name, he gained a credit with the bank, and reaped all the advantages which could be derived from the apparent ownership of the sum deposited, assuming his authority so to make such a deposite, and having received the benefit, the law declares, and justice seems to require, that he should bear the loss. Nor is there any peculiar hardship in the establishment of such a principle, which would deter a prudent trustee from assuming upon himself the responsibilities of such a fiduciary relation ; as it is at all times in his power to avoid any risk or responsibility by clothing the transaction in its true colours, and making the deposite not in his own name, but in the name of him who is the real owner, and for whom he is trusted. That such is the doctrine of a court of equity, we need only refer to a case reported in 4 *Maddox's Ch. Rep.* That was the case of an agent, who gratuitously undertook the collection of debts for certain trustees, which he deposited with a banker, then in good credit, but who ultimately failed ; there as here, the money was deposited in his own name, and upon interest, and the *vice-chancellor* in delivering the opinion of the court expressed himself in the following emphatic terms. "This may be a case of individual hardship, but the court is bound to proceed upon those principles, which are deemed essential to the general interests of mankind. The defendant being the gratuitous agent of his sister's trustees,

receives their money which he mixes with his own, by paying it into his own bankers and on his own general account. These bankers were in the habit of paying him an interest of *three per cent.* on the moneys in their hands. The defendant says he meant to give credit to the trustees for their proportion of the interest, but he never made any intimation to that effect. This money is partly lost by the failure of the bankers; and the question is, whether the defendant can throw this loss upon the trust. I will not say what might have been the effect if he had placed these moneys in the same bankers' hands, with full information of the trust and to a distinct trust account. It is sufficient to say, that here the defendant gave no notice to the bankers that any part of the moneys in their hands was trust property. Both he and they treated the money as wholly his own; and the bankers considered themselves as his agents solely. It is said that he gave notice to the trustees that he had so invested the money, and that they did not object to it, and are therefore to be considered as having authorized it. If he had given full notice with whom he had invested it, and that he had mixed it with his own moneys, and that an interest would be derived from it, there would have been great weight in that argument, but his letter of the 26th of January, 1816, only states that it is in bank, not stating with what banker, or that it is mixed with his own moneys, or that a profit is to be derived from it. The fact alleged by the defendant, that he had always a balance in his bankers' hands equal to the trust money, is in my view of the case immaterial. I consider the trust moneys thus mixed with his own and placed in his banker's hands, on his own general account, to be an employment of the trust money for his own advantage or his own credit; and that he is therefore responsible for the loss which has resulted from it." It is true this was the case of a gratuitous agency for trustees, but the principles upon which he was held responsible, would, we think, equally have applied if the deposite had been made by the trustees themselves, and a loss under similar circumstances had subsequently

occurred. The reasoning of the court upon which the agent was held responsible, would equally have applied to his principals. The principle of the decision in 4 *Mad.* received the sanction of *Lord Chancellor Eldon*, in a case to be found reported in 11 *Vez.* 377. That was the case of a receiver who was charged with a loss arising from the failure of a banker, to whom remittances had been made to his own credit and use; and not to a separate account for the trust. In that case the *Lord Chancellor* says, it would be most dangerous to let a receiver deal with the money as his own, until the time his accounts are to be passed, “and if any loss occurs, then to deal with it as the trust estate.”

In the settlement of his second account with the Orphans court the appellant charged himself with the legal interest of *six per centum*, and not with the bank interest for which he had stipulated upon making the deposite. It is not readily perceived upon what ground this was done, unless he considered the deposite to have been made upon his own responsibility; and if prior to the failure of the bank, he had become insolvent, the credit which he obtained with the bank on his own account would have enured to the benefit of his creditors, and his ward must have sustained the loss. In the case above referred to in 11 *Vez.* the *Lord Chancellor* says, if he (the receiver,) had failed before the failure of the bankers, this estate could never have claimed any part of the balance there, for it was carried to his own private credit, and there was nothing to prevent his paying any other debt with it; and although the claims of creditors upon the fund deposited might be defeated by the exhibition of the endorsement upon the certificate, showing on whose account the deposite was made, yet we think it clear, the bank would have had a right to appropriate the money so deposited to the satisfaction of any demand they might have had against the appellant. This may be a case of some hardship to the appellant, but in such a conflict of interest it is of less consequence that individual injury should be sustained, than that the wisdom and policy of established principles should be violated.

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Before closing this opinion we wish it however, to be distinctly understood, that we do not mean to decide that a guardian could protect himself from loss, by making the deposite in the name of his ward without the sanction of the Orphans court, but mean to leave that question unaffected by any views herein expressed.

We therefore think that the decree of the Orphans court of *Baltimore* county was correct, and ought to be affirmed with costs.

DECREE AFFIRMED.

MARGARET ALEXANDER vs. WILLIAM STEWART AND
OTHERS.—*December, 1836.*

The Orphans courts have exclusive cognizance in the appointment of administrators, *de bonis non*, and where an executor had not completed his trust, by the payment of all legacies and the delivery over of the property in his hands to the persons entitled, the exercise of the power of appointment was held to be rightful.

It is the duty of an administrator, *de bonis non*, thus legitimately clothed with authority, to take possession of the effects of the deceased testator existing specifically; return an inventory thereof to the Orphans court, and to distribute the same among the parties entitled, according to their respective rights; and with the due exercise of this lawful authority, no tribunal can rightfully interfere.

The inadequacy of the sureties in an administration bond, may under certain circumstances, furnish a basis for the ancillary jurisdiction of a court of equity in restraining the authority of an administrator, until the *Orphans court* can inquire into the subject and secure the parties concerned, by demanding new security.

So the Orphans courts are the exclusive judges of the sufficiency of the penalty of the bonds required of executors and administrators, and the court of Chancery, cannot in this respect, review their determinations.

Property remaining specifically after the death of the original executor or administrator, is unadministered property; and the appointment of an administrator, *de bonis non*, in such case, is indispensably necessary to give title to the distributees, even though all the debts are paid, and if in such circumstances, the administrator of the first executor transfers the property to the distributees, their possession is liable to be divested by the subsequent grant of letters *de bonis non*.

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A court of Chancery has no power to vest property so situated in the distributees, except through the medium of such administrator, whose duty it is, after the return of an inventory, if the debts are paid, to transfer the property to the parties entitled without delay.

APPEAL from *Chancery*.

The bill was filed in this cause on the 15th December, 1835, by *William Stewart*, and the infant children of *Eaton R. Partridge*, and charged that *John Partridge*, by his last will and testament, after making devises and bequests in favour of his sister, *Margaret Alexander* and others, devised all the residue of his estate of every kind to said *Stewart* and *John B. Morris*, in trust for said *Eaton R. Partridge*, for life, with remainder to his children, and deliverable to them upon their attaining the age of twenty-one years; that said *Eaton* was appointed executor of and obtained letters testamentary upon the estate of said *John*; that said letters were granted on the 21st September, 1831, and an inventory returned of said estate on the 25th September, 1831, the appraised value of which, (including money of the testator on hand at his death amounting to \$11,007 95,) amounted to \$207,134 95; and consisted (beside said money,) almost entirely of stocks in various corporations; that said executor after due and legal notice paid off all the creditors of the deceased; that said *Eaton* transferred unto himself, all the stocks and property which he, under the said will, was directed to hold in trust for certain specified legatees, and effectively administered said estate; and was ready to transfer to said *William Stewart* and *John B. Morris*, the property devised to them in trust as aforesaid; that said *Eaton*, as executor aforesaid, rendered to the Orphans court of *Cecil* county his first and only account on the 11th October, 1833, which shows the full administration of said estate, save only the payment of \$6,000 to the three children of *James Partridge*, which was to be made only after the rendering of said account—and that the residue of said estate then in his hands was equitably the property of the said trustees, for the trust established by the will of said *John Partridge*. And the said bill then charged, that the balance

of said estate exhibited in said account, as in said executor's hands, amounting to \$170,893 37½, consisted of, and yet exists in, property specifically of said testator, and embraced in the inventory aforesaid and therein appraised to \$135,005, of the description following, that is to say: certain enumerated stocks, &c.; and the residue of said balance \$35,888 37 was accountable for in money by said *Eaton*, and is yet so by his representatives, subject to such deductions as may be equitable and proper; that a part of said balance has been invested by said *Eaton*; that on the 24th August, 1835, said *Eaton* died intestate, and that administration on his estate has been granted to his widow, *Susan S. Partridge*, who was also appointed guardian of his infant children. The bill further shows, that since the said *Eaton's* death, the said *Margaret Alexander* was appointed by the Orphans court, of *Cecil* county aforesaid, administratrix *de bonis non*, *C. T. A.* of the estate of said *John Partridge*, and bonded therefor; that the said *Margaret* claims of said administratrix of *Eaton*, and seeks to get into her possession and control, the balance of the said testator's estate in said *Eaton's* hands accountable for as aforesaid, and deliverable over by said *Eaton*, as well the stocks aforesaid specifically remaining of said testator's estate, as the residue aforesaid of said balance appearing payable as aforesaid in money; that she is thus taking without any desire to benefit the *cestui que trusts* or to accomplish the intentions of the testator, but to subject said estate to the unnecessary formality of going through a prolonged and supervening administration, and the heavy tax of further commissions for a useless and dilatory ceremony; that the said property in his hands will be in jeopardy and danger of loss; that the sureties of said *Margaret*, as well as herself, are entirely insufficient for the amount of said bond; that the bond which was for \$100,000 is insufficient in amount; that she claims to have the whole residue of said estate brought into her possession; that said *John B. Morris* declined acting under said will; that *Susan S. Partridge*, the administratrix of *Eaton*, is proceeding to settle up his estate, and is willing

to place all the evidences of the claims of the said *John's* estate under the control of this court for the directions thereof; and that complainants are ready to indemnify said *Margaret* for the expenses of said administration *d. b. n.* and pay her such reasonable compensation as may be directed by this court.

Prayer that *Susan S. Partridge*, as administratrix of *Eaton*, may account for him as executor of said *John*; and that she may be directed to pay all sums and property due that estate into this court, &c.; and if necessary, that your complainants may use the name of *Margaret Alexander*, in all such suits at law against said *Susan S. Partridge*; that said *Margaret*, as administratrix, *d. b. n.* may be ordered to transfer to your complainant as trustee all the stocks specifically remaining of said *John's* estate, and all claims against said *Eaton* and his sureties, and that said *Susan* may be enjoined from delivering to said *Margaret*, any of the certificates of stock, or evidences of title relating to the property of her said testator, and that said *Margaret* may be enjoined from, or in anywise interfering with any of the stocks aforesaid, and from instituting any proceedings in the Orphans court of *Cecil* county to recover the same from said *Susan*; and from further prosecuting any suit already commenced, and for other relief upon this bill, (with which was exhibited the will of *John Partridge*, and the inventory of his estate,) the Chancellor (*Bland*,) ordered an injunction as prayed. And on petition on behalf of the infants, appointed a receiver to receive the dividends on the stocks of the estate subject to the future order of the court.

The answer of *Margaret Alexander*, admitted the will of *John Partridge*; the appointment of *Eaton R. Partridge*, as his executor by the Orphans court of *Cecil* county, his inventory and account; that she was ignorant whether said *Eaton* had paid all, but knows that he had *not* collected all the debts of the deceased; she denied that said *Eaton* did effectually administer said estate, and charged him with wasting it; she denied that his account shows a full administration of said

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estate, or that the residue was equitably the property of the trustees under the will ; she admits the specific enumeration of the stocks, and *Eaton's* death ; the appointment of his administratrix and guardian to his children ; her own appointment as administratrix *d. b. n.* of *John Partridge* ; and that it is her intention to get into her possession the estate of the said *John*, to which she is by law entitled ; denies all improper motive or administration for improper, illegal, or unnecessary purposes, and charges that she is the sister of deceased ; that the property will not be in jeopardy, and that she has given ample security, and is willing to give any further security which the courts may demand, and insists upon the exclusive jurisdiction of the Orphans court upon the subject of the security given by administrators, and that she is ready to proceed according to law with her said administration.

The other parts of the answer are not deemed material by the reporters.

The Chancellor upon motion, after the coming in of the answer, refused to dissolve the injunction, but continued it until final hearing or further order of the court, upon which the said *Margaret Alexander*, took her appeal to this court, under the acts of 1835, ch. 346, sec. 2, and ch. 380, sec. 3.

So much of the will of *John Partridge* as is necessary, is sufficiently adverted to in the argument of the counsel in this cause.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

McMAHON for the appellant contended :

1. That the Orphans court of *Cecil* county had full power to grant letters of administration *de bonis non*, with the will annexed, upon the estate of the late *John Partridge*, to the appellant ; and that the authority conferred by such letters, rightfully extended to all the estate left by said *Partridge*, and especially to all of it remaining specifically in the hands or

under the control of the late *Eaton Partridge*, as executor of said *John Partridge*, at the decease of said *Eaton*.

2. That whether the letters were or were not improvidently issued, the authority of the Orphans court of *Cecil* county to grant them could not be collaterally drawn into question, nor the authority conferred by such letters impeached, denied, or controlled in the proper exercise of it by a collateral proceeding in another court, such as was the bill of the appellees in this case, and the injunction issued thereon; and that therefore the appellees were not entitled to the injunction in this case upon the ground that the letters of administration to the appellant were unnecessarily or improvidently granted.

3. That the injunction in this case cannot be sustained upon the ground, that the security given by the appellant as said administratrix *de bonis non* was insufficient, because the question of the sufficiency of such security was one over which the Orphans court of *Cecil county* had exclusive jurisdiction; and because the equity of the bill, if any, as to this ground, is wholly removed by the answer of the appellant.

4. That the remaining equity, if any, is wholly denied by the answer.

5. That whether the court of Chancery could or could not properly afford relief by injunction in a case like the present, these complainants were not the proper parties to seek it, and were not entitled to the injunction.

He further contended, that the material question was, whether an administrator *de bonis non*, properly appointed by the Orphans court, could be restrained from the exercise of power expressly granted by an act of assembly. From the bill it appears, that a large amount of the assets of the deceased remained specifically in the hands of the first executor; that he had wasted a large amount by an unauthorized and pretended investment, and from the will of *John Partridge*, five distinct bequests appear.

1. A devise in trust to *Eaton R. Partridge*, for the appellant and his children, a part of which was in bank stock.

2. A legacy to each of *James Partridge's* children living at the death of the testator.

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3. Bequests relating to the manumission of his negroes.

4. A bequest of the law library of the testator to the son of *Eaton R. Partridge*, at the age of twenty-one.

5. The residue of his estate to *Stewart and Morris*, in trust for *Eaton*, for life, with remainder to his children.

The extent of *Eaton's* administration is conceded by both bill and answer. The trust estate to *Margaret* and her children has been completed. The bequest to the children of *James Partridge* was also completed, and there is no allegation that any refunding bond was taken. The answer denies the manumission of the negroes or the money paid to them. It denies that the bequest of the library has been completed. It denies that the debts due the estate are collected. The proceedings show the extent to which the estate is unadministered, and the answer denies all intention to injure it, while the sufficiency of the security given by administrators *d. b. n.* is insisted upon.

The act of 1798, ch. 101, sub ch. 5, sec. 6, and sub ch. 14, sec. 2, provides for the granting of letters to administrators, *d. b. n.* and directs them to administer all things not converted, not distributed or delivered over. The act of 1820, ch. 174, but for the decision of *Sebley vs. Williams*, 3 *Gill and John*. 61, I should construe to direct that the whole estate of a deceased should pass to the hands of the administrator, *d. b. n.* But that decision is otherwise, so that where the acts of 1798 and 1820, do not cover the property of the deceased, an administrator, *d. b. n.* cannot recover at law, as for wasted and consumed property; and if the object of the injunction was to prevent a recovery for such a conversion, it is unnecessary, as the law gives full protection. While, if the law entitles the administrator to recover, an injunction cannot restrain her.

If the Orphans court had no power to grant these letters, chancery cannot impeach nor over-haul them, as the whole jurisdiction in granting letters is conferred on the Orphans court, and its action in that respect cannot be impeached collaterally in equity. *Raborg's adm'r vs. Hammond's adm'r*, 2 *Har. and Gill*, 42.

Again, if the estate is fully administered, what purpose can the injunction answer? The administratrix of *Eaton*, can then protect herself at law, and the interference of equity is unnecessary.

If the property is wasted, the bond is answerable for *Eaton's* misconduct.

If the estate is *not* fully administered, and *Mrs. Alexander* could recover at law, it is certain, that chancery, by injunction, cannot over-haul the jurisdiction of the Orphans court. One court cannot prevent another court from carrying out its decrees.

Then as to the security. If the administratrix, *d. b. n.* was regularly appointed and good security accepted, chancery cannot interfere.

A court of Chancery will entertain a bill against an executor or administrator on the ground of insufficient security; but this bill is not for that. It denies the power to grant letters at all. It does not proceed on the ground that they were rightfully granted, and the parties fearful of abuse. The English cases do not apply. There the executor gives no security. There are some cases in which the administrator gives security in the ecclesiastical courts, then chancery will interfere. The act of 1798, sub ch. 3, sects. 1, 5, 6, 7, are clauses which relate to the *primary* security. The act of 1807, ch. 136, sec. 3, authorizes the Orphans court to take additional security. Here in four weeks after grant of letters, chancery was prayed to interfere. What is it then but a direct impeachment of the Orphans court, on points exclusively confined to its jurisdiction? Confidence must rest somewhere. The law confides this power of judging of the sufficiency of the security to the court granting the letters. This court cannot review its action upon appeal in such cases, and yet it is supposed, that a court of Chancery, collaterally by injunction, can impeach the decision and prevent the party from going on. The right to interfere in such mode must be upon supervenient insolvency, as in cases of administration in *England*. The primary power of appointment, and the

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primary judgment of security resides in the Orphans court ; and so the primary power over the additional security must reside in the same court, under the act of 1807, which was only declaratory of the law. Even if it be a case of concurrent jurisdiction, the Orphans court commenced the matter, and the grievance ought to be stated there. In such cases chancery comes in as subsidiary, and on the ground of inadequacy of relief. So of creditors and distributees bills, which proceed on that ground, or to make the relief sought more diffusive and effective. The jurisdiction of the Orphans court is exclusive, and chancery is ancillary. Show an appropriate legal remedy and chancery cannot act.

When an equitable defence is extended at law by statute, chancery loses its jurisdiction with the necessity for the case.

But if we concede jurisdiction on the question of the security, what becomes of the equity of the bill? The answer denies the alleged insufficiency, and offers to give any further security. The court calls her in for further security and she offers it. She is not to be ousted nor treated as an insolvent.

Nor has chancery any jurisdiction over the question of commissions, 1798, sub ch. 10, sec. 2, 1820, ch. 174. *McPherson vs. Israel*, 5 *Gill and John*. 60.

He further contended, that the proper complainants were not before the court, who could insist upon the wrongs mentioned in this bill. It alleged that the whole estate had been administered—of course, for any redress resort could only be had to *Eaton's* bond. *Margaret Alexander* is about to complain of his administratrix, and she is no party complainant here ; yet she is the proper party to complain for the redress of every grievance which can be considered on this motion. On this motion the question of insufficient security is not of the cause. *State use Chamberlain vs. Wright*, 4 *Har. and John*. 148. And the administrator alone represents and is authorized to collect the personal estate. Legatees cannot recover except through her, even after payment of all debts. *Woodin, et al vs. Bagley's ex'r*, 13 *Wend*. 453.

D. STEWART for the appellee contended :

That the injunction was properly continued.

1. Because the answer did not deny the equity of the bill, since it admitted all the allegations as to the complete administration of the estate ; and did not deny that the debts of the testator had been paid, while it admitted the due notice to creditors to present their claims. And in effect showed that the appellant had but a mere formal duty to discharge—that of transferring to the trusts of the will for *Eaton R. Partridge's* children, the stocks specifically remaining of the testator's estate.

2. Because if the question can be made on this appeal, the injunction was properly granted. A court of equity having jurisdiction in case of legacies, and being authorized to enforce the payment of the legacies here, and protect the interests of the legatees in the manner by the bill prayed, even if as to all, but these appellees, the estate had not been administered ; and notwithstanding it might not appear that the interests of the appellees would be jeopardized by allowing the appellant to take possession of the estate.

3. Because, notwithstanding the renunciation of *Morris*, as trustee, the plaintiff, *Stewart*, in connection with the *cestui que trusts*, had a right to prosecute this bill, and claim the protection of the trust property, and that the court having jurisdiction for the benefit of these legatees might proceed as in case of other trusts, to decree as might be equitable for all parties concerned in the estate of the testator.

The court will perceive that letters were granted to *Eaton* in September, 1831. That he immediately returned an inventory, and on the 11th October, 1833, settled his first account as executor. He died in August, 1835. The appellant has received her legacy, and all the legatees had a right after the lapse of thirteen months, under the act of 1798, sub ch. 8, sec. 1-14, to receive their legacies. His account for commissions was settled with the Orphans court, who paid him for the whole estate. The negroes were transferred according to the directions of the will, and in short, there was nothing

to do except to hand over the large bulk of the estate to the trustees appointed by the will. The creditors were all paid off, and as to the outstanding debts whether they were sperate or desperate does not appear. These circumstances show that in effect the estate of *John Partridge* was fully and effectually administered, and that the appellant should not have interfered with it for any purpose. *Royall vs. Eppes*, 2 *Munf.* 490.

MAYER for the appellee.

It is within the power of the court of Chancery, as in a case of trust, to take cognizance of the legacy of complainants. An executor is regarded as a trustee in chancery. The duty of *Eaton R. Partridge*, as to this estate, was also the duty of *Mrs. Alexander*. If he was bound to surrender it to the trustee, so is she. The counsel has confounded the fact of the consummation of this administration with the ordinary evidence of it. The stocks which remain specifically, belong to the *cestui que trusts*, and the administrator, *d. b. n.* under the act of 1820, has no right to interfere with them, though it is the only property remaining, for there is no necessity for an administration. Considering the two administrators as identical in point of law, this is a bill for relief. The prayer calls for a transfer of the stock. It is undeniably the property of the appellees, and if *Eaton* was in default at his death, in not transferring this property, and it is now competent to *Mrs. Alexander* to make an inventory of and procure a commission upon it from the Orphans court; the jurisdiction of chancery over this as a legacy is entirely excluded. In *Coward and Martin vs. The State*, ante, 7 *Gill and John*. the court considered the right of distribution perfect at the end of thirteen months, and though no final account is passed. The court will look to the fact that the debts are paid, independent of the accounts, which are the mere record evidence of the settlement. The rights of the distributees are vested rights at the time of the death of the testator—suspended merely as to the right of recovery—full time, four years, has elapsed to pay debts—notice given and no pre-

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tence of debts existing, and even a creditor may assert his rights in this court after notice of his claim. The executor could not have set up an outstanding indebtedness in opposition to this bill, and it is of course not competent to any of the parties. *Freeman vs. Fairlie*, 3 Merr. 37. If that be out of the way, nothing remains but the legacies to the minor children of *James Partridge*. With regard to jurisdiction over legacies, I refer to the act of 1798, sub ch. 10, sec. 11, which shows that chancery may interfere. A court of equity will decree immediate payment from those bound ultimately according to the justice of the case. *Riddle vs. Mandeville*, 5 Cranch, 330, and if this is clear, for what purpose go into equity except for commission.

The legal estate in the stocks is vested in the administrator, *d. b. n.* but we have a right to intercept it in chancery. *Share, et al vs. Anderson's ex'rs*, 7 Serg. and Raw. 62. *Dorsey vs. Smithson*, 6 Har. and John. The administrator, *d. b. n.* is the representative of the intestate. An executor is a mere trustee in equity, and on that principle chancery settles the estate. 2 Sch. and Lef. *Batten vs. Earnley*, 2 Peer. Wms. 163. *Slamming vs. Style*, 3 Peer. Wms. 336. 3 Bac. abr. *Tit. ex. and ad. Letter A. T.* 1 Story Com. 512. *Toll. Ex'r*, 482, 496.

R. JOHNSON, for the appellee.

When this bill was filed the period under the notice given had expired for creditors to bring in their claims, and no liability existed except as to debts exhibited. The bill alleges no other debts. The answer does not deny it. On this motion the facts not denied are true. The complainants are all the parties interested on the distribution of the residue of this estate, except only a legacy due to a minor son of *James Partridge*. *Mrs. Alexander* was a legatee and paid in full. So far as mere justice is concerned nobody ought to touch this estate, except the complainant and the minors. *Mrs. Alexander* has no possible interest in winding up this estate, except the commissions she may earn. It is an administration

contrary to the wishes of the parties interested, and saddles the estate with further commissions. It can only end in loss and risk of injury to them. I propose to examine.

1. What were the rights of the complainants in the lifetime of *Eaton R. Partridge*.

2. Whether those rights at the death of *Eaton*, are at all altered by not having formally administered the estate in full.

With reference to what is a full administration that is to be decided here, with reference to the rights of the parties, as they would be upon a full administration. With reference to creditors, their rights are to be considered, as to what constitutes a full administration in respect to them. The same rule applies to distributees. 1798, ch. 101, sub ch. 8, sec. 6, 14.

The actual payment of debts is the epoch at which the right to distribution commences; after *thirteen* months, there is a presumption of payment of debts. Before that upon proof of actual payment the right attaches. It may attach immediately after the death. The object of the act of 1798, and all such laws, is to pay over to the distributees the property of a deceased, as soon as the contingency happens on which their title is consummated. It is solely to ascertain beyond dispute that the contingency has happened. All its provisions are nothing but machinery to bring about the actual payment of debts, and carry out the intentions of testators. None can doubt that before the death of *Eaton R. Partridge*, he could be called to surrender specifically the assets and account for the assets converted by him into money, and this could be done in equity, though a concurrent jurisdiction should exist in the Orphans court. *Story's Equity*, 505 to 552.

Then what is the effect of the executor's death on the rights of their complainants.

The bill is misapprehended. It is not a bill to revoke letters, nor to interfere with the powers of the Orphans court. It is to keep out of the hands of the administrator, *d. b. n.* the assets, the right to which existed in the complainant, before this second administration was granted; or to ask in

chancery, that the second administrator shall be considered as a mere formal party, so as to prevent the Orphans court from deciding upon it as an original administration.

What would the courts do upon a bill against *Eaton*, in his life, in the event of his death? Would you have deemed an administration, *d. b. n.* necessary? Would you have decided the question of commissions or sent that inquiry to the Orphans court for adjudication. The question is clear. If jurisdiction once attaches it draws every question necessary to justice between the litigants before it. Even in a case of an original administration, if jurisdiction once attached in chancery, that court would settle the question of commissions. Equity has concurrent jurisdiction, and a concurrent right to settle every question. The act of 1798, is to be construed with reference to the court in which the administration is completed. The case of *Raborg vs. Hammond*, 2 *Har. and Gill*. 42, is decisive of this point. The Orphans court has *exclusive jurisdiction over the appointment*, but that once made, a trustee is brought into existence. Chancery jurisdiction attaches, which is co-extensive with the whole subject and conclusive in its action. It would be an anomaly, that a court of admitted jurisdiction having the cause should not have the power to inquire into and compensate a trustee for his trouble. When an administrator accounts in chancery, that court is the best court to fix the allowance. The act of 1798, is only exclusive where the executor accounts before the Orphans court. There is another inconvenience. There is no difference in the time allowed the first, second, or third administrator to settle before the Orphans court. Each has thirteen months from the date of their respective letters, and in this way a full administration upon the idea of exclusive jurisdiction in the Orphans court might be unnecessarily and almost indefinitely postponed. The case of *McPherson's adm'rs, vs. Israel, adm'r of Agnew*, in 5 *Gill and John*. 62, was intended to apply to a claim for commissions, upon a perfect administration before the Orphans court, whether the work of one or more administrators and the estate was not to

be taxed more than ten per centum. But in construing the act of 1798, we are competent to look at the law of administration in *England*, and the duty of the administrator, *d. b. n.* there, is his duty here, except altered by act of assembly. He is there merely considered as the successor of the first administrator. It could not be the intent of the law to compensate him, without considering how far the estate had been administered.

Whatever condition the estate is, in the hands of the first administrator; whatever the rights of legatees as against him, the same exist against his successor, who is not to return an inventory, nor claim for property wasted by his predecessor, nor give notice to creditors, nor to settle any account showing disbursements but in his own time, and consequently, if the period has elapsed, at which the right of the legatee is in action against the first administrator, and he dies, the administrator, *d. b. n.* is liable to the same obligations and rights. He is a mere successor. Under the act of 1798, sub ch. 5, sec. 6, sub ch. 14, sec. 2, it is in the discretion of the Orphans court to grant letters, *d. b. n.* By the grant, it does not deprive the court of Chancery of its original inherent jurisdiction, which it never loses, but from the action of some exclusive jurisdiction.

Again, the question of insufficient security is not confined to the Orphans court. The act of 1807, was not declaratory of the law; it is merely cumulative. Before its passage chancery had jurisdiction of this question, and it takes away no power from that court.

The second administration not necessary to put the distributees or legatees in possession of the specific assets. If bonds existed due to the testator they could be handed over. If money, or bonds, or notes exist, taken by the *first administrator*, the legal title passes to his administrator. And as to stocks, the bank or company, become a trustee for the party entitled. And where there is a bond for the payment of debts and legacies, there can be no administration, *d. b. n.* Once ascertain that the debts are paid and the law does the

rest. The material question is the meaning of the term administration, does it mean payment of debts, or a full and entire delivery over of the whole estate. We contend our title is complete, and that an actual payment to us by the representatives of *Eaton*, would be a flat bar to the administrator, *d. b. n.* *Share, et al vs. Anderson's ex'rs*, 7 *Serg. and Raw.* 62. Then why is it, that a court of equity will not relieve at once by causing an actual transfer of the property. The case of *State use Chamberlain vs. Wright*, 4 *Har. and John.* 148, has no application here.

There can be no objection to the period at which the claim is asserted, and though after the appointment of administrator, *d. b. n.* It is like a defence under a plea pleaded *puis darrein continuance*. The matter would always have been a defence if it had existed, and if not such a defence, it does not become so. The case of *Evans, et al vs. Iglehart, et al*, 6 *Gill and John.* 171, shows the right to go into chancery, and 3 *Bacon abr.* 75, establishes, that the right of a distributee is a vested right at the death of the testator, and we contend, that this injunction is only ancillary to the relief prayed for. We seek to be at once entitled to possession of the property, and to prevent the necessity of a second administration. It being in the hands of an administrator, *d. b. n.* or even the right to it being in her, does not defeat this bill as all the parties are here. The injunction is to keep them in *statu quo*, and so protect us from delay.

McMAHON for the appellants, in reply.

This is a bill to protect *Eaton R. Partridge*, in the enjoyment of commissions for services not performed, and the defendant is the widowed sister of his testator, *John Partridge*. The whole equity of the bill charging the property to be in jeopardy is gone. The simple contest is about commissions. The assets to \$25,000 were wasted by the executor, and what they grudge to the widowed sister, is a paltry commission of five per cent. and to keep her from this, she is impeached with improper motives. The bill raises the ques-

tion, whether equity will enjoin an officer in the due discharge of his duty. It is a bill to provide for the economical administration of the estate of poor *John Partridge*, and to provide an administrator, *d. b. n.* for it, and thus dispense with his sister, *Mrs. Alexander*. Every party must ask for relief consistent with the facts stated in his bill. The object of the relief, is to prevent her action as administratrix, though entitled to the undistributed property, and compel payment by the administratrix of the first executor. Whatever may be the character of the relief prayed, the injunction has nothing to do with it. We seek a dissolution of the injunction which restrains us. I inquire, *first*, can an injunction go to prevent a party from instituting a confessedly groundless claim, defeasible at law? I turn *first* to the specific property, \$135,000, remaining in the hands of the administrator of the first executor, *Eaton*. The right to that is denied. Does not the power of the Orphans court extend to the undistributed property? And to the grant of letters affecting it? The counsel concede the power. They say it is discretionary. All agree, that if the estate is not fully administered, the administrator, *d. b. n.* is entitled. What is full administration? A performance of all the duties, the payment of all the debts, the delivery over of all the distributive shares. It is conceded if the debts are not all paid, the estate is not fully administered. I ask, has the executor fully administered? No, he was ready to do it. The argument opposed to me is, that the question of full administration is one not in regard to the whole estate, but only in regard to the particular complainant in each case. Every grant of letters of course presupposes something to be administered. It is a question between the court and the administrator, *d. b. n.* if any duty remains, the general rule is, that letters must go. Exceptions I leave with my opponent. The letters issued on the ground that a duty is to be performed. Letters must go, for no person is competent to recover without them. Creditors and legatees always recover through the representatives of the deceased. The act makes it imperative to grant letters if not

fully administered. It is not discretionary with the Orphans court ; but if so, there is the judgment of a court of competent jurisdiction which has decided the question. The bill concedes, but that for the intervention of chancery, the administrator is competent to recover the property. All it attempts to do is to show conflicting rights, and therefore concludes, that the administrator, *d. b. n.* not entitled.

The proposition is not tenable. If the administrator dies, and property goes into the hands of the administrator, *d. b. n.* the administrator of the first administrator is not responsible, for he is not in privity with the first deceased. Upon these points he cited : *State use Chamberlain vs. Wright*, 4 Har. and John. 148. 1820, ch. 174.

Upon the question of commissions he insisted in reply, that the bill was not founded on the idea of concurrent jurisdiction in chancery and the Orphans court, but on the ground of exclusive jurisdiction, in the former having power to prevent the Orphans court from proceeding—nullify its judgment by injunction. *Mrs. Alexander* commenced her action in the Orphans court, but her progress there was arrested, and chancery asked to decide the question of commissions. Chancery has no power to grant commissions to an executor or administrator. Act of 1798, ch. 101, sub ch. 10, sec. 2.

Under the act of 1820, there is an exclusive grant of power to allow commissions to the Orphans court. Although the question is not open on appeal, and a power is given *nomi-native*, yet the idea of a concurrent jurisdiction is that the power may be exercised in two courts. This is denied. The selection of a particular tribunal by the law imports exclusive jurisdiction in it. This is a statute power. A new power, and it is discretionary in its exercise. This is exclusive, and no other court by analogy can take the jurisdiction.

Independent of express legislation, an executor or administrator is not entitled to commissions. 1 Wil. 1138. Chancery had no original jurisdiction on that head. *Manning vs. Manning*, 1 John. C. 529. The object of the statute was to produce uniformity, and a power vested in a particular tribu-

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nal under fixed limitations is exclusive ; and if the ground of jurisdiction on the principles of incidental power is sound, chancery can attract to herself the administration of all estates on the application of legatees.

Where a bond is given to pay debts and legacies, it is a full administration. It converts legacies into debts. But this furnishes no analogy. It has been supposed because *Eaton R. Partridge* was personally responsible for the debts, that it was like the bond above referred to ; but they stand on different grounds, and upon all, then we insist that the injunction ought to be dissolved, and *Mrs. Alexander* permitted to proceed as administratrix, *d. b. n.* in the Orphans court, as in ordinary cases.

ARCHER, Judge, delivered the opinion of the court.

The object designed by the injunction in this case is, in our judgment, unattainable. The administratrix, *de bonis non* was appointed by a tribunal having *exclusive* cognizance of such an appointment, and was in our judgment rightfully appointed such administratrix by the Orphans court. The executor had not completed the administration, not having paid all the legacies, or delivered over the property in his hands to the persons entitled thereto, without which, there could be no full administration.

Having thus been legitimately clothed with authority by the Orphans court, the law imposed upon her the performance of certain duties, among which, was the duty to take possession of the effects of the testator, existing specifically ; return an inventory thereof to the Orphans court, and distribute the same among the persons entitled thereto, according to their respective rights. With the just, legal, safe, and diligent exercise of this lawful authority and duty, no tribunal could rightfully interfere.

The pretences set up in the bill for such a proceeding, are either destitute of any foundation in the established principles of equity or are removed, if they did exist, by the answer.

We propose briefly to examine the allegations on the subject, that we may ascertain the weight to which they are severally entitled. And first, it is proper to advert to the only allegation in the bill, which seems to look to an injunction as the proper consequence.

It is alleged that the property will be subjected to danger, because the securities are insufficient for the amount of the bond.

The insufficiency of the security in the administration bond, under certain circumstances, may furnish the proper basis for the exercise of the ancillary jurisdiction of a court of equity, in granting its restraining authority, until the *Orphans court* can inquire into the subject, and by the exercise of its authority, render all persons interested, secure, by demanding new security. Such a power, in such a case, might be necessary to save the estate from waste or ruin. But it might perhaps, be doubted, whether the court of Chancery when the *Orphans court* have exercised this jurisdiction, and there has been no insufficiency of security by supervenient causes, could by the exercise of an original jurisdiction review and reverse what had been done. But if the jurisdiction of the court of Chancery on this subject be not merely ancillary, but it possesses a power at all times to inquire and determine on the sufficiency of securities, and to adjudge that new security shall be given, such an equity is here distinctly met by the answer, which avers the security to be good, and offers moreover, such security as the chancellor would deem unexceptionable.

Again it is averred, that the complainants are in danger of a loss, from the fact averred, that the penalty of the bond taken by the *Orphans court* is not sufficiently large. In answer to this, it may be remarked, that the judging of the penalty of a bond, is confided by law to the *Orphans court*, whose duty it is to take such bond, and that the Chancery court possesses no power to review their determinations; and possessing no such power this allegation cannot aid the complainants.

It is further alleged, that the administratrix can only subserve the purpose of a mere ceremony, and will be calculated only to produce delay, and burthen the estate with additional costs and commissions. Believing as we do, that where property remains specifically, after the death of the executor, and that is conceded in this case, it is unadministered property, the taking out of letters of administration is not only demanded by the acts of assembly, but was indispensably necessary to enable the purposes of the testator to be executed, and to give title through the medium of an administrator, to the persons entitled to distribution. We cannot conceive that such proceeding was a useless ceremony. The costs and commission likely to accrue on such administration which forms the subject of complaint, although they will not necessarily be an additional burden to the estate, yet if such should be the case, are the mere legal incidents which are attached to the performance of the duties demanded of the administrator; and cannot legitimately furnish the grounds of any complaint, or create a subject for redress by the intervention of the powers of a court of equity.

If it be conceded that delays are incidental upon an administration, *de bonis non*, this concession could not aid the complainants, for they are delays in fulfilment of the acts of the legislature, and necessary to the legal accomplishment of the title, the complainants are solicitous to obtain.

On this subject it has been well observed, that had the avoidance of delay been the great object of the complainants, such object would more certainly have been attained by allowing the administratrix, *de bonis non*, to have proceeded in the discharge of her duties, for if it had even been necessary that the estate should have remained in her hands for thirteen months, the distributees would before this time, have been entitled to the delivery over and payment of the property and funds belonging to them.

But we apprehend that no such delay could have been necessarily consequential upon this administration. For after the return of her inventory, if the debts were all paid, it would

have been her duty to have paid over the estate in her hands to the persons entitled to it without delay.

It appears to have been erroneously supposed by the draftsman of this bill, that it was entirely competent for the administratrix of *Eaton Partridge*, to have passed the property remaining specifically in her hands to the distributees, without the intervention of an administrator. It is true, if all the debts were paid, they were beneficially entitled to it; but they could not have been clothed with a legal title but through the medium of an administrator, and had their possession been thus acquired, it might have been liable to be divested by the grant of letters subsequently to an administrator, *de bonis non*. The act of assembly, in express terms, rendering effects specifically existing liable to administration.

It is equally clear, that the Chancery court could by no decree have vested the title in them, but by co-operating to accomplish such a purpose through the administrator. But in this instance we cannot perceive the smallest justification for the exercise of such a power. For instead of there being delay on the part of the administratrix, *de bonis non*, the very complaint is of diligence in the performance of her duties, in her efforts to obtain possession of the property, in which efforts she is restrained by the process in this cause.

We are of opinion that the order of the chancellor granting, and the order refusing to dissolve the injunction, were erroneous.

The injunction will therefore be decreed to be dissolved with costs, and the case will be remanded to the court of Chancery.

ORDER REVERSED.

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THE PENNSYLVANIA, DELAWARE, AND MARYLAND STEAM NAVIGATION COMPANY *vs.* WILLIAM H. DANDRIDGE.—December, 1836.

The declaration stated that the defendants in consideration of the sum of \$33 33, to be paid by the plaintiff to the defendants, undertook safely and securely to take a certain schooner or vessel on board which the plaintiff had laden, "certain goods, chattels, wares, and merchandise, from, and out of the ice, and from and out of the harbour and Port of Baltimore," &c. which goods, &c. it was alleged, were lost in consequence of the neglect and refusal of the defendants to perform their promise. *Held*, on motion in arrest, after verdict, that the declaration was defective, because it did not allege any consideration for the defendants' promise; no agreement or promise on the part of the plaintiff to pay the \$33 33, being averred. 2d. That upon the case made by the declaration, it was not necessary to allege the payment of the money; the performance of the defendants' agreement, being a condition precedent to their right to demand the remuneration. 3d. That the general description of "goods, chattels, wares, and merchandise," was insufficient, and that a definite description should have been given of the cargo.

Where the declaration charges, that the injury sustained by the plaintiff, is the result of the total neglect and refusal of the defendant to perform his engagement; evidence of a negligent and imperfect performance is inadmissible, and by implication contradictory of the charge. Under such a declaration the right of the plaintiff to damages is limited, to such as naturally result from the defendants' total neglect and refusal to perform his contract, and they cannot be inflamed by evidence of a negligent performance.

A declaration which alleges a contract to tow a vessel and cargo out, safely and securely, is not supported by proof of a contract to tow out free from a particular description of danger.

In the one case, the contract would cover a loss from any and every cause, while in the other, there could be no recovery, unless the loss arose from the danger particularly named in the contract.

Quere, whether a declaration alleging an act to be performed in consideration of the payment of \$33 33, is sustained by proof that \$33 33 $\frac{1}{2}$ was the sum to be paid?

Since the act of 1825, ch. 117, questions of variance between the allegation and the proof cannot be raised in this court, unless they were made in the court below.

The agent, a stockholder, of an incorporated company, (the defendant in the action,) who made the contract with the plaintiff, is not a competent witness for said company in regard to such contract. In such a case, the witness has a direct interest in the event of the suit, independently of his acts as agent.

All the surrounding circumstances of the transaction should be submitted to the jury, provided they can be established by competent means, and afford

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any fair presumption or inference as to the question in dispute. And in deciding upon the admissibility of such circumstances, it must be assumed, that the evidence proposed to be given would establish them to the satisfaction of the jury.

Where the general object and design of a charter is to create a company to transport passengers and merchandise from B. to P. and the company appoints an agent, such agency, unless otherwise proven, is limited to the business of the company, connected with, or relating to such object and design.

Where a company was incorporated, "for the purpose of establishing and conducting a line or lines of steamboats, vessels, and stages, or other carriages, between P. and B. for the conveyance of passengers, and transportation of merchandise and other articles," a contract by such company, for the breaking of ice and towing vessels through the track thus broken, such vessels being bound for V. is invalid, and cannot be enforced against them.

Corporations are not only incapable of making contracts which are forbidden by their charters, but in general they can make none, which are not necessary, either directly or indirectly to effect the objects of their creation.

It is no ground for refusing a prayer that the party has asked of the court, less than he was entitled to.

The circumstance that a corporation has entered into a contract, does not estop it from denying its competency to do so in an action brought against it, founded upon such contract. If such was the case, in reference to the corporation, the estoppel would apply equally to the other contracting party, and thus in effect, limitations upon the powers of corporations would be of no avail.

If the defendants in this case had been, by their charter, authorized to make with the plaintiff a contract to take the vessel, on board of which his merchandise was laden, through the ice, and there was no express agreement that they would be responsible to the plaintiff, for all losses or injuries which might arise, if the said vessel was not carried through in safety; then the defendants were only bound to use reasonable efforts, care, and diligence, and not bound to the extent of common carriers.

In such case if the loss does not result from the want of care and diligence on the part of the defendants, but from the default or omission of the agents of the plaintiff to avail themselves of the means of safety, when fully apprised of the danger to which the property is exposed, the defendants would not be liable.

The county court in instructing the jury, as to the facts which it would be necessary to find, to shew an adoption and ratification by the defendants, of the contract alleged to have been made by their agent, said, that if the consideration for such contract had been received by the agent, and paid over to the defendants, who retained the same, that then the said facts are in law an adoption of the contract, and as binding on them as if a previous authority had been given the agent. This instruction was held to be erroneous; first, because the jury were not required to find, that the defendants *knew* on what account the money was paid them,—and second, that the defendants *knew* the terms of the contract on which the money was received.

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APPEAL from *Baltimore* county court.

This was a special action of trespass on the case commenced by the appellee against the appellants, on the 31st December, 1831, in which he declared, for, that whereas, heretofore, to wit: on, &c. at the city and port of *Baltimore*, to wit: at, &c. the said plaintiff safely and securely loaded in, and upon a certain schooner or vessel called the *Hunter*, certain goods, chattels, wares, and merchandise, of great price and value, to wit: of the price and value of five thousand dollars, current money, of him the said plaintiff, to be carried and conveyed on board of, and by the said schooner or vessel, to foreign parts beyond seas, to wit: to the *State of Virginia*; and the said schooner or vessel being, and there, to wit: on, &c. at, &c. so loaded with the aforesaid goods, chattels, wares, and merchandise, of him the said plaintiff, and ready to sail and proceed on her said voyage, was delayed and detained from proceeding on her said voyage, in consequence of the gathering of ice in the *Patapsco river and Chesapeake bay*, and the obstruction of the navigation of the said river and bay thereby, to wit: at the county aforesaid; and they, the defendants, in this action, well knowing the premises, afterwards, to wit: on the day and year aforesaid, at the county aforesaid, undertook and faithfully promised the said plaintiff, that they, the said defendants, for and in consideration of the sum of thirty-three dollars and thirty-three cents, to be paid by the said plaintiff to the said defendants, would safely and securely take the said schooner or vessel, so loaded as aforesaid with the goods and chattels of the said plaintiff, from and out of the ice, and from and out of the harbour and port of *Baltimore* aforesaid, to and at such point or place of safety, in the said river or bay, below where the same was frozen, and below where the navigation thereof was obstructed by ice, as aforesaid, by breaking the said ice and towing the said schooner or vessel to such point or place of safety as aforesaid. Yet the said defendants not regarding their said promise and undertaking, and not regarding their duty in this behalf; afterwards, to wit: on the day and year aforesaid, at

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the county aforesaid, neglected and refused so to do, although thereto requested by the said plaintiff; whereby, and by reason of the negligence and improper conduct of the said defendants and their agents, the said schooner or vessel was injured, stranded and lost, and the aforesaid goods and chattels, wares, and merchandise of the said plaintiff became and were greatly broken, damaged and destroyed, and wholly lost to the said plaintiff, to wit: at the county aforesaid; wherefore the said plaintiff saith he is injured and hath sustained damage by reason of the non-compliance by the said defendants, of their said contract, to the value of five thousand dollars, like current money, and therefore he brings suit, &c."

The defendants pleaded that they did not undertake or promise in manner and form as, &c. on which issue was joined.

The verdict being for the plaintiff, the defendant moved in arrest of the judgment, and assigned the following reasons in support of their motion:

1. Because the plaintiff's declaration in this cause does not show or allege any consideration for the defendants' undertaking and promise therein declared upon.

2. Because the plaintiff's declaration in this cause alleges, that the promise of the defendants' declared upon, to carry out safely the *Hunter*, and the plaintiff's goods on board of her, was made for and in consideration of the sum of thirty-three dollars and thirty-three cents, to be paid by the plaintiff to the defendants; and it is not shown or averred in said declaration, that the said sum ever was paid to the defendants or any one for them.

3. Because the plaintiff's declaration in this cause alleges the defendants' promise, and the consideration therefor, in the manner stated in the second reason above; and it is not averred in or shown by said declaration, either that the plaintiff ever paid said consideration to the defendants, or any one for them, or that the plaintiff ever promised to pay said consideration to the defendants, or was under any obligation to pay the same to the defendants, or any one for them.

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4. Because said declaration does not sufficiently describe the property of the plaintiff on board the *Hunter*, nor shew the number, kind, and quality of the goods.

These objections were over-ruled by the county court, (*Archer, Ch. J.*) and judgment rendered for \$2,347 79½.

1ST EXCEPTION.—At the trial of this cause, the plaintiff, to support the issue on his part joined, by *Jones* proved, that in the month of December, 1831, the plaintiff had in the harbour of *Baltimore*, two vessels, one of which called the "*Independence*," belonged to the plaintiff, and the other called the "*Hunter*," was chartered by the plaintiff, who was a resident of *Virginia*, for the voyage to *Baltimore*, and back again to the *Rappahannock*, in *Virginia*. That whilst the said vessels were lying in the harbour of *Baltimore*, the navigation of the *Patapsco* river became so obstructed by ice that the said vessels were unable to get out of said harbour into the *Chesapeake* bay, and that whilst they were thus detained in said harbour, an arrangement was set on foot for securing the aid of steamboats in cutting through the ice, and towing out into the bay, vessels detained by ice in said harbour. That the plaintiff having heard that such an arrangement was in progress, and being then confined to his room by severe indisposition, applied to the witness, his friend, and requested the witness, as his, the plaintiff's agent, to contract for towing out his said two vessels, and that he, the witness, as such agent, having heard that the arrangement for so towing out vessels, was being made, with the *agents* of the defendants, having the charge and management of the line of steamboats established and conducted by the defendants between *Baltimore* and *Philadelphia*, applied for the purpose of making a contract to have the said vessels of the plaintiff towed out, at the office kept by said agents in the city of *Baltimore*, and that he, the witness, as the agent of the plaintiff, there contracted with *Hugh McElderry*, as the agent of the defendants, for the towing out of plaintiff's said vessels. That at the time of said contract, he, the witness, informed *McElderry*, that one of the vessels, to wit: the *Hunter*,

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which was the smallest, had a cargo on board, and agreed to pay him thirty-three dollars and a third, for the transportation of each of said vessels, and that therefore *McElderry*, as the agent of the defendants, agreed with witness, as the agent of the plaintiff to take the said vessels (the *Hunter* being so loaded,) from the harbour of *Baltimore*, through and out of the ice, free of damage of ice.

The plaintiff then offered to prove by said witness, that shortly afterwards, and on the *Thursday* afterwards, the steamboat *Independence*, owned by the defendants and the steamboat *Maryland*, employed by the said agents of the defendants, having collected the vessels to be towed out, to the number of fifteen or sixteen, began the proposed expedition, the *Independence* going ahead to break the ice and the *Maryland* following with the vessels in tow, and that the said two vessels of the plaintiff, the *Hunter* and the *Independence*, were in the line of the vessels so taken in tow, and in or near the rear of the line. That the said steamboats and the vessels taken in tow, made their way in safety through the ice, to a place called *Hawkins' Point*, several miles distant from *Baltimore*; *Jones*, the witness, being on board the schooner *Independence*, belonging to the plaintiff—that at said last mentioned place, the vessels were detained for some time, by the stoppage of the steamboats, and that whilst there, a *Mr. Wilson* came on board the said vessel in which the witness was, to collect the sum above mentioned, as contracted to be paid by the witness as the plaintiff's agent, for the transportation of his said two vessels. That *Captain Gundry*, the captain of said schooner *Independence*, then objected to the payment being made, and remarked to witness, in the presence of said *Wilson*, "you are not going to pay until we are carried out," and that said *Wilson*, in reply, then assured them, that they had already gone through the thick ice, and they were nearly out of the ice, that there could be no doubt about their getting out safely, if they would make secure the fasts which connected them with the vessel preceding them in the line, and that thereupon the witness paid said *Wilson*

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the money so contracted to be paid by him, for the transportation of both of said vessels. The plaintiff further offered to prove by said witness, that shortly after the payment of said money, and on the same evening the vessels again got under weigh, and that after they had gone a mile or two from the place at which they had stopped, just after night-fall, the fasts of the second vessel ahead of the vessels of the plaintiff, in the line of vessels which the *Maryland* was then towing out, gave way, and that the vessels whose fasts gave way, cast off the fasts of the vessel behind her, as did the latter vessel cast off the fasts of the plaintiff's vessel, the *Independence*, and both made sail to overtake the line of vessels ahead, that the plaintiff's vessels made the same efforts, but the wind being light, the night very cold, and the ice forming very fast, they were unable to make any progress, although they hoisted sails, and made efforts to go ahead—that the plaintiff's vessels being thus left in the ice near dark, they remained there until some time in the night, when the steamboat *Maryland* returned up the track, and came alongside of the plaintiff's vessels—that the witness then applied to *Captain Taylor*, the captain of the *Maryland*, and most earnestly and repeatedly entreated him to take the plaintiff's said vessels out of the ice, to which *Taylor* replied that he could not, for any sum of money, as he must be in *Baltimore* that night. That witness being then very much alarmed at the situation of said vessels, which he believed to be in great danger, then repeatedly and earnestly requested *Taylor* to take the vessels back to *Baltimore*, and offered *Taylor*, he believed, the sum of one hundred dollars to do so, and that *Taylor* refused either to take the vessels out of the ice, or to bring them back to *Baltimore*—that witness having his brother-in-law, a blind man, on board with him, and being very much alarmed about his situation, if left in the ice, applied to *Taylor* to bring them up back to *Baltimore*, in the *Maryland*, which he agreed to do; that witness and his brother-in-law accordingly went on board the *Maryland*, and that the *Maryland* then went up the track about a quarter of a mile, where she lay in the ice all night.

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The plaintiff further *offered* to prove by *Captain Gundry*, a proper and competent witness examined in his behalf, that he was the captain of the plaintiff's schooner *Independence*, and on board of her as such, at the time mentioned by the witness, *Jones*, when the said vessel and the schooner *Hunter* were taken in tow by the steamboat *Maryland*, to be towed from the harbour of *Baltimore*, through and out of the ice—that the steamboat *Independence* went ahead to break the ice, and the *Maryland* followed with the vessels in tow—that about two hours before sun-down on *Thursday*, the ———, the day on which they left *Baltimore*, they reached *Hawkins' Point*, and remained there until near sun-down, for what purpose the witness did not know. That whilst there, *Taylor*, the captain of the steamboat *Maryland*, came along the line of the vessels, and told the captains of the vessels, and witness among others, that they must secure their vessels by sufficient fasts, and he would take them out of the ice in the course of two hours, and that witness went to work to secure the fasts of his vessel, and secured them in the best possible manner. That shortly afterwards, a person came on board his vessel, to collect the money to be paid for carrying out the *Hunter* and *Independence*, and applied for it to *Jones*, the witness, on board the witness' boat, and that witness objected to paying until they were out of the ice, but that upon said person's assurance that they were then nearly through the ice, and there was little, if any, doubt about their being carried out in safety, the money was paid by *Jones* to said collector—that about sun-down, the vessels again got under weigh, and that after they had proceeded a short distance, when just after night-fall, the fasts of the second vessel ahead, gave way, and she, and the vessels immediately in her rear, successively cast off their fasts, and made sail in the manner stated by the witness, *Jones*, and that the fasts of the witness' vessel being thus cast off, he hoisted sail, and made every effort to follow, but without success; that his efforts to get out without assistance proving fruitless, his vessel, and the *Hunter*, and the *Blackbird*, remained in the track near each other until the

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return of the *Maryland* up the track—that the *Maryland* returned about midnight the same evening, and stopped within one hundred yards of them, when witness having made his fasts ready to attach his vessel to the *Maryland*, asked *Taylor*, the captain of the *Maryland*, if he was ready—to which he replied, “for what,”—and witness replied, “to take them out.” That *Taylor* then said, “no, he would not do it,” and asked witness why he did not make his fasts good and hold on—and that witness replied, that he did, but that the fasts of the second vessel ahead gave way. That *Taylor* then began to break the ice around the witness’ vessel, to get by, when witness and *Jones* repeatedly and earnestly besought *Taylor* to take them out of the ice, which he refused to do; and that they then repeatedly and earnestly besought *Taylor*, for justice, for mercy, for humanity’s sake, either to take the vessels out of the ice, or to bring them back to *Baltimore*, and that *Taylor* refused to do either. That *Jones* offered *Taylor* one hundred dollars to bring the vessels back to *Baltimore*, which *Taylor* also refused, and then stated that the steamboat *Independence* coming up the track, and would take them up to *Baltimore*. That witness then said, “we’ll starve here,” to which *Taylor* replied, that he would give them provisions, and did accordingly furnish them with some provisions. That *Jones* then applied to *Taylor* to take himself and his brother-in-law, a blind man, back to *Baltimore*, in the *Maryland*, to which *Taylor* agreed, and they accordingly went on board the *Maryland*, and she went on up the track towards *Baltimore*, and lay all night in the ice about a quarter of a mile above. The plaintiff further offered to prove by the said last mentioned witness, that on the next evening, being *Friday*, the said steamboat *Independence* came along up the track, on her return to *Baltimore*, and that he, the witness, made the same appeal to the captain of that boat which were made to *Taylor*, to induce the former either to take the plaintiff’s said vessels, the *Independence* and *Hunter*, out of the ice from *Baltimore*, or to take them back to *Baltimore*, and that he also refused to do either, as

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Taylor did. That on *Thursday* night they had hoisted sails and made all the efforts to get out which they could make, but that on that night it was so very cold, and froze so rapidly, that on *Friday* morning the track which had been opened the day before, was completely frozen over, and covered with ice, so thick and hard that the men were able to walk on it, and did walk on it all day on *Friday*, and that they lay in the ice all *Friday*, without making any further efforts to get out, which they considered useless. That on *Saturday*, the crews of the *Independence* and the *Hunter* recommenced their efforts to get out, when about daylight a violent storm came up, in the course of which the *Hunter* was driven against the *Independence*, and broke her bowsprit, and came alongside and unshipped her rudder—that during the storm, the crew of the two vessels made efforts to get some of the articles out of the *Hunter* into the *Independence*, but only succeeded in getting a small quantity of provisions. That the storm continued with great violence, and about three o'clock in the day, the said two vessels being then near the edge of the ice, and in the floating ice, the *Hunter* was so much injured that witness thought it would be risking the lives of the crew to leave them on board of her; and deeming it necessary for the safety of his vessels, to make a place for shelter, and to abandon the *Hunter*, he took the crew of the latter on board of his vessel, leaving the *Hunter*, was out of sight of her in five minutes, and has never seen her since.

The plaintiff further offered to prove by *John O. Treacle*, a competent witness on his behalf, that he was the captain of the said schooner *Hunter*, at the time spoken of by the witnesses, *Jones* and *Gundry*, when said vessel, with the *Independence*, commanded by *Gundry*, and several others were taken in tow by the steamboat *Maryland*, to be towed out of the harbour of *Baltimore*, through the ice, in December, 1831—and that the *Hunter* was then loaded with goods for the plaintiff, and had been chartered for the voyage from *Virginia* to *Baltimore*, and back again, to the plaintiff by the witness' father, who was owner of said vessel—that his said

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vessel and the *Independence*, whilst being towed out by the *Maryland*, were left behind in the track, below *Hawkins' Point*, and in the manner stated by the witness, *Gundry*—that on the return of the *Maryland*, during the night, up the track to *Baltimore*, application was made to *Captain Taylor*, of the *Maryland*, to take the said vessels out of the ice, in the manner stated by the witnesses, *Jones* and *Gundry*, which *Taylor* refused, and said he had some vessels to take back to *Baltimore*. That *Jones* then asked *Taylor* to take the said vessels back to *Baltimore*, and offered him one hundred dollars to take them back, but *Taylor* still refused, and said the *Independence* would take them back. That on the next evening, being *Friday*, the steamboat *Independence* came along up the track, on her return to *Baltimore*, having vessels in tow, and that application was made to the captain of that boat also, either to take the *Hunter* and the *Independence* out of the ice from *Baltimore*, or to bring them back to *Baltimore*, who refused to do either, as well as *Taylor*, of the *Maryland*. That on *Thursday* night, when they were left in the track they hoisted sails, and made every effort to get out, but made no progress, the wind being light, the night extremely cold, and the ice making very fast, and on *Friday* morning the track was frozen over, so that the hands of the two vessels walked upon the ice made in the track, and that they lay in the ice all *Friday*, without making any progress—that on *Saturday* morning they renewed their efforts on board both of said vessels to get out of the ice, about daylight, when a violent storm came up, in the course of which the *Hunter's* rudder was lost, and her bowsprit and night-heads broken, and also her lower rudder irons. That the *Hunter* continued alongside of the *Independence* until about three o'clock in the day, when *Captain Gundry*, of the latter vessel, said he must leave the *Hunter*, and try to get to some place of shelter, to save his own boat—and that witness with the crew of the *Hunter*, then got on board the *Independence* for the safety of their lives, and the *Independence* cast off the *Hunter*, and was soon out of sight. That during the storm, efforts were made

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to get some of the goods out of the *Hunter*, which proved unavailing, and that when it was found that it would be necessary to abandon the *Hunter*, and that there was no chance for saving her, the witness stripped her of her sails, and secured her cable and one of her anchors—that at the time when the witness left the *Hunter*, the water was nearly up to the cabin floor, and the pump frozen—and that the *Hunter* belonged to the witness' father, and was not insured, and her loss was a total loss to him.

To the introduction of all of which testimony so *offered* by the plaintiff to be proved by the said witnesses, *Jones, Gundry, and Treacle*, the defendants, by their counsel, objected.

1. As inadmissible generally under the pleadings in this action.

2. As inadmissible for the purpose of establishing for the plaintiff any claim to damages for the loss of his goods on board the schooner *Hunter*, in the manner proposed to be proved, inasmuch as the plaintiff's declaration declares on such loss as resulting directly from a total non-performance on the part of the defendant, of his contract to carry the *Hunter* through the ice, and the proof offered is of a loss of said goods resulting from an imperfect or negligent performance of the contract when it was in part executed.

3. As inadmissible for the purpose next above mentioned, because the loss alleged in the plaintiff's declaration is therein stated to have resulted directly from the defendants' neglect or refusal to perform his contract, and the proof offered is of a loss of said goods resulting from the action of a storm as its proximate cause, and there is no averment in said declaration, of the existence or action of said proximate cause, so as to let in proof of it, or of the defendants' alleged neglect or violation of contract, by which he exposed said vessel to the action of such proximate cause.

But the court over-ruled all said objections and admitted said evidence. The defendants excepted.

2ND EXCEPTION.—In addition to the testimony stated in the preceding, the defendants' first bill of exceptions, the

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plaintiff's witness, *Jones*, on cross examination, further stated that at the time he made his contract with *McElderry*, as to towing out the *Independence* and the *Hunter*, *McElderry* was making out a list of the vessels to be towed out, and that the witness gave *McElderry* the names of his vessels to be put down, with the sums to be paid by him; that witness had no conversation with *McElderry*, as to the origin or character of the enterprise, and never heard him intimate a doubt about its success. That he was positive that *Taylor* never asked him to let him (*Taylor*,) bring the said vessels back to *Baltimore*, when he, *Taylor*, was returning with the *Maryland*, up the track, and that, on the contrary, witness repeatedly urged *Taylor* to bring them back, and even offered him a reward for so doing, which *Taylor* refused. That the *Maryland* had no vessel in tow on her return, and at the time when she came up to the vessel in which the witness was, but that after she passed the *Independence* and the *Hunter*, and just above where she lay in the ice all *Thursday* night, she took several small vessels in tow, principally wood boats, and that he was quite confident that the *Maryland* brought no vessel from below the boat in which witness was. That the *Hunter* and the *Independence* could not get up on *Thursday* night to where the *Maryland* lay all night, as the ice was making very fast, and that he, witness, never applied to the defendants, or their agents for the return money which he had paid as before stated, for taking out the said vessels.

The plaintiff's witness, *Gundry*, also stated, on cross examination, that he did not recollect, that whilst the vessels were lying at *Hawkins' Point*, *Taylor*, or any one else told them to make their fasts secure, for if they got loose he could not wait for them. That *Taylor* had no vessel in tow, when on his return up the track in the *Maryland*, he came up to the plaintiff's boat. That he assisted in stripping the *Hunter*, and saw no water in her, but did not examine her; that she had three or four hands with the captain. That the *Hunter* was stripped just before the *Independence* parted with her, and that the latter parted with her at the edge of the ice.

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That the *Independence* was a larger vessel than the *Hunter*, and was nearly empty, and could have taken the goods in the *Hunter*, and have carried them easily, if they could have gotten them out of the *Hunter*, and that he was confident that both *Taylor* and the captain of the *Independence* were frequently requested to bring the vessels back to *Baltimore*, and refused to do it.

The plaintiff's witness, *Treacle*, also stated, on cross examination, that the *Independence* left the *Hunter* when they were in the broken ice; and that after leaving her, the *Independence* took shelter under the high lands of *Magothy*. That when *Taylor* was on his return in the *Maryland*, he had one vessel in tow, and that he said there were also vessels above, which he, *Taylor*, had to take back to *Baltimore*. That *Taylor* positively refused to take the vessels back to *Baltimore*, but said he would come down for them next morning. That witness had on board his vessel, the *Hunter*, two hands besides himself and a working passenger.

The plaintiff then offered evidence, that under an agreement with *McElderry*, as the agent of the defendants, that it should not prejudice his rights; he, the plaintiff having heard that the *Hunter* had gone on shore on *Kent Island*, appointed agents to secure the cargo as far as practicable, and to dispose of it to the best advantage, if so damaged as not to justify the return of it to *Baltimore*. That the *Hunter* went on said shore on the evening of *Saturday*, and when examined, was found to have one or two holes in her stern, through which the tide was ebbing and flowing, the examination being made a day or two after she went ashore. The plaintiff also proved that the cargo secured by the said agents, being in a damaged state, was disposed of to the best advantage at *Chestertown*, and the net proceeds of the sale, deducting all expenses, was sixteen hundred and forty-four dollars and twenty one cents. It was also admitted, that the value of the plaintiff's goods on board the *Hunter*, at the time of her being left by the *Independence* and her crew, was \$4,000.

The plaintiff then proved by *William H. Gatchell*, a com-

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petent witness on his behalf, that in December, 1831, the said *Hugh McElderry* was the general agent for the defendants, and as such, made contracts for the transportation of goods and passengers by the *Citizens Union Line of Steamboats*, a line of boats established and carried on by the defendants, between *Baltimore* and *Philadelphia*, and that the boat *Independence* was one of the boats employed by the defendants in that line, and that the transportation of goods and passengers between *Baltimore* and *Philadelphia*, or to any intermediate point, on the route of their said line, was the ordinary business of the defendants in the conduct of said line.

The defendants then offered to examine the said *Hugh McElderry*, with whom the witness, *Jones*, had stated that he had made for the plaintiff, the contract declared upon in this action; but it being admitted that the said *McElderry* was a stockholder of *The Pennsylvania, Delaware, and Maryland Steam Navigation Company*, the defendants in this action, the plaintiff, by his counsel, objected to the examination of said *McElderry*, but the defendants, by their counsel, contended that he was a competent witness, to prove what contract he did make as the agent of the defendants, with *Jones*, as the agent of the plaintiff; but the court were of opinion that *McElderry* was an incompetent witness, and that his testimony was not admissible in this case, even for the latter purpose, and accordingly would not permit the defendants to examine him for said purpose. The defendants excepted.

3D EXCEPTION.—After the evidence stated in the defendants' preceding bills of exception had been offered, the defendants proved by *Captain Lemuel Taylor*, (he having been first duly released by the defendants,) that in December, 1831, at the time when the contract, offered in evidence by the witness, *Jones*, is stated to have been made, he, *Taylor*, was the captain of the steamboat *Maryland*; and that on *Wednesday*, the ——— of December, 1831, *Mr. Meeteer*, the president of the *Citizens Union Line*, sent for witness to

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engage his services and the services of his boat, the *Maryland*. That before the witness went down to the office of the *Citizens Union Line*, Jones, the witness called on the witness, Taylor, and wanted to make a bargain with him about towing out the schooners *Hunter* and *Independence*, above mentioned. That witness informed Jones, that he had just received a note from Mr. Meeteer, to engage the assistance of the *Maryland*, in towing out the vessels on the proposed expedition, and that he, witness, had nothing to do with making the bargain for towing out the vessels, and that witness directed Jones to go for that purpose to the office of the *Citizens Union Line*. That shortly afterwards, witness went down to said office, and there found Jones in conversation with said Meeteer, about towing out said vessels. That Jones then stated to Meeteer, that he wanted to make a contract about towing out said vessels, to which Meeteer replied, that he did not know that there would be a sufficient number of vessels to induce them to undertake it. That Jones then said to Meeteer, "he might set him, Jones, down for two vessels," and that Meeteer then stated to Jones, that there was a doubt, whether the company would succeed in the effort if made, although he thought they would, but that the company would not be at any risk, nor responsible for the property. The defendants further proved by said witness, that having contracted with Meeteer to give the aid of his boat, in the attempt to tow out the vessels, he, witness, went to work to prepare for the expedition, and to collect the vessels, and that on Thursday morning, about eight or nine o'clock, they set out, the *Independence* going ahead to break the ice, and the *Maryland* following, having the vessels in tow. That after they had proceeded about a mile, the wind rose, and pressed the vessels in the rear of his stern, to the danger of his own boat, so that the witness was obliged, for the safety of the *Maryland*, to let go the vessels, which then made sail, and followed after him in the track, for five or six miles, and until they got to, or near to *Hawkins' Point*, where Captain Trippe, of the *Independence*, stopped to get a supply

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of wood for his boat; that the vessels all lay there for some time, being then, as witness thinks, within a mile and a half, or two miles of the edge of the ice, and that he, witness, then went along the line of the vessels, including the *Hunter* and the *Independence*, and directed the captains of the vessels to make their fasts secure, as his situation would be such, that if their fasts gave way he could not wait for them. That near dark the *Maryland* set out again from the place at which they had so tarried, having the vessels in tow, (including the *Hunter* and *Independence*,)—that he, witness, had no knowledge that any of them had broken loose, or were left in the track, until he found them in the track, upon his return. That the *Maryland* got through the ice about eleven o'clock at night, on *Thursday* night, and after the vessels were out of the track, that the witness immediately returned with the *Maryland*, up the track, whilst *Captain Trippe* with the *Independence*, and a vessel which he had in tow, went to *Annapolis*. That a short distance below where the vessels left, were, the *Maryland*, on its return, stopped in the track, to take in tow a boat which lay in the ice, at a distance of fifty or a hundred yards from the track, to get which in readiness to be towed, the *Maryland*, on her way down, had left a person who went down in the *Maryland*, at the instance of the owners, to assist in endeavouring to have said boat towed up. That after the *Maryland* had got this boat in tow, she went on up the track, until she encountered the vessels left, including the plaintiff's said vessels—that the witness, not knowing that any vessels had been left, as he approached them, remarked that here were stragglers in the track, and on being hailed by the witness, *Jones*, witness asked what they were doing there, to which *Jones* replied, that they had been left; and on witness asking why they had not secured their fasts, *Jones* replied that they had. That witness was then urged by *Jones*, to take the plaintiff's vessels out, but refused, and assigned, amongst other reasons for his inability to do it, the injured condition of his boat, the *Maryland*. That witness, however, then offered to bring the

said vessel back, and would have done it with great cheerfulness, but that this was declined by *Jones*, and that although the *Maryland* then lay alongside of, or near to the *Hunter* and the *Independence* for some time, *Jones*, and the captains of the said vessels, not only never asked the witness to bring the vessels back to *Baltimore*, and never made any effort to fasten their vessels on to the *Maryland* for that purpose, but actually refused to be brought back. That whilst there, the witness supplied one of said vessels with some provisions, and told them that the track was clear, and that if they would hoist sails, and make exertions, they could get out, but they made none as far as the witness saw. That after the *Maryland* passed these vessels, she went up the track about three hundred yards, where, the vessel being injured, the witness deemed it prudent to lay by all night. That witness, with the *Maryland*, then took in tow other vessels, to take them to *Baltimore*, amounting in all, with that brought up, to six, for which he received only one hundred and six dollars. The said witness, *Taylor*, further proved, on cross examination, that he told *Mr. Meeteer* that he thought the vessels could be towed out, as it had been done before—that he did not recollect seeing any of the captains of the other vessels there, at the time of *Jones'* conversation with *Meeteer*, testified to by witness; that the *Independence* was better prepared than his boat, for getting through the ice. That the buckets of his boat were much injured by the ice striking against them, and that the pay received was scarcely sufficient to pay the damage actually sustained. That he did not tell *Jones* or the captains of the *Hunter* and the *Independence*, when on his return up the track, that he would come back for them, but then offered to take them up to *Baltimore*, and that he did not tell them that the *Independence* would take them up, but that the *Independence* would be along, and would keep the track open. When he came up to the vessels, on his return up the track, there was a light wind, and he, witness, told them to hoist sails and make exertions to get out, but they made none—that of the vessels which were left, and which

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he found in the track on his return up it, one was *Captain Traverse's* vessel, which was the hindmost vessel, and which got out safely.

The defendants then further proved by *James Taylor*, a competent witness on their behalf, that he was in the *Maryland* on the night spoken of, when the *Hunter* and *Independence* were left in the track, and when the *Maryland* met said vessels on its return up the track; that he heard *Captain Taylor*, of the *Maryland*, offer to *Jones* to bring said vessels back to *Baltimore*, which offer was refused; that it was his impression, that if the said vessels had then made exertions they might have made their way out—that the *Maryland* lay that night in the track, about three hundred yards above said vessels, and that during that night, the witness did not see any exertions made by their respective crews to get them out. The said witness also stated, on cross examination, that in his opinion the *Maryland* could have carried said vessels out that night—that he saw the witness, *Captain Taylor*, in conversation with *Jones*, but did not hear the whole—that he heard the offer of *Taylor*, to bring the vessels back to *Baltimore*, but does not recollect hearing any thing said about the return of the *Independence*.

The defendants further proved by ——— *Gray*, a competent witness on their behalf, that he was on board the *Maryland* on the occasion spoken of by the other witnesses, when the *Hunter* and *Independence* were taken in tow, to be towed out of the port of *Baltimore*—that he heard *Captain Taylor*, of the *Maryland*, when they stopped at *Hawkins' Point*, give the vessels notice, and these among others, to make their fasts secure, and that it must be at their risk, for if they broke loose, it would be impossible for him to turn back for them. That on the return of the *Maryland* up the track, these vessels, the *Hunter* and *Independence*, with three others, were discovered to have been left in it. That *Taylor* then offered to bring the *Hunter* and *Independence* back to *Baltimore*, but refused to turn back and take them out of the ice, and that the *Maryland* then had in tow a boat which she

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had brought from below, and near the edge of the ice. That *Taylor's* offer to bring the vessels back to *Baltimore* was declined, and that whilst near them, *Taylor* supplied one of the said vessels, at the request of its captain, with some provisions. That before the *Maryland* left said vessels on her way up, *Jones*, the witness, with a blind man, came on board, whom witness found in the cabin of the *Maryland*, when he went to supper. That witness then heard *Jones* express high satisfaction at getting on board the *Maryland*, and that *Jones* then remarked that the crew of the boat he was in, were not trustworthy—that he could not get them out of the cabin to do any work—that he could not trust himself with them—that they were mostly lazy blacks, and that he believed said crew could have taken the boat out, if they had made proper exertions.

The defendants then offered to prove by ——— *Norris*, a competent witness on their behalf, that the enterprise or attempt to tow out vessels, in the progress of which the *Hunter* and *Independence* were left in the ice, as stated by the witnesses in this cause, originated with witness, who had several vessels detained by the ice in the harbour of *Baltimore*. That in consequence of the severity of the weather, the harbour had been for a long time closed, to the great injury of the commerce of the city of *Baltimore*, and that witness applied to *Meeteer*, the president of the company, defendants, and offered three hundred dollars to them if they would tow his vessels out. That said president expressed much reluctance at first to make the attempt, but finally agreed if a number of vessels offered to be towed out, sufficient to defray the probable cost of the enterprise. That a sufficient number was procured, the vessels paying according to tonnage, and including witness' three vessels, for which he paid three hundred dollars. That when the said president agreed to undertake the enterprise, it was distinctly understood by the witness, that the company were to be at no risk, and were not to be paid any thing if they did not succeed in the enterprise. That such was the nature of the witness' contract

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with them, as far as witness understood the nature of the arrangements into which the said president agreed to enter, when at witness' instance they agreed to make the attempt.

To the admission of which evidence, the plaintiff, by his counsel, objected, but the defendants, by their counsel, insisted that it was admissible generally, under the issue in this cause, and that if not admissible generally, it was admissible for the purpose of sustaining the statements made by the witness, *Taylor*, as to the conversation proved by him, to have been held between the witness, *Jones*, and the said *Meeteer*, and also, as evidence from which, in deciding between the contradictory statements of *Taylor* and *Jones*, the jury might be enabled to determine with whom *Jones* in fact made his contract, and what that contract really was. But the court (*Archer, Ch. J.*) were of opinion, and so decided, that the said evidence was not admissible, either generally, or for any of said purposes, and accordingly rejected all of said testimony. The defendants excepted.

4TH EXCEPTION.—After the evidence stated in defendants' preceding bill of exception had been offered or given, the defendants further proved by ——— *McCulloch*, the facts proved by *James Taylor* and *Gray* in the third exception, and then further proved by *Captain Trippe*, a competent witness on their behalf, that he was captain of the steamboat *Independence* on the occasion spoken of by the witnesses, when the *Hunter* and the *Independence* were taken in tow. That his boat went ahead to break the ice, and after getting through the ice, went on to *Annapolis* with a boat in tow, which it had taken in tow at *Hawkins' Point*, reached *Annapolis* between ten and eleven o'clock that night, and on the next day, (*Friday*,) got the *Pacific* in tow, a vessel which, by the original arrangement, was to be towed up, if they succeeded in getting through the ice; and that the agreement to tow this vessel, in that event, had been made before the arrangements to tow the vessels out from *Baltimore* was completed—and before the contract proved by *Jones*. That on his return to *Baltimore* with the *Pacific* in tow, he got to the edge of the ice about or near dark, on *Friday* night, and

got the other vessels there waiting to be towed, in readiness, and set out on his return up the track—that in the track met with several vessels, whose crew, or some of them, stated that they had been left on the voyage down, and requested witness to take them out of the ice—that witness refused to turn back and take them out, as he did not deem it prudent for many reasons—that no request was made to him by any of them, to bring them or their vessels back, which he could and would have done with great cheerfulness. That amongst the vessels he so met in the track, were three lying together, by which or some of which the application to take them out was refused by him, but none of them desired him to take them back to *Baltimore*. Witness also stated, that the enterprise was undertaken at the instance of, and to gratify the wishes of the mercantile community of *Baltimore*, whose commerce was suffering from the harbour having been so long closed by ice—that it was considered questionable whether the attempt would prove successful, and that the compensation received did not pay the expenses and damages sustained in the accomplishment of it. That after witness' boat passed the said vessels on the track, it went on until it met the *Maryland* in the ice near the *Fort*, much injured, and wanting his assistance to get to *Baltimore*, which, with his aid, it reached on *Saturday* morning. That the *Maryland* was not sheathed behind, nor armed with axes to cut the ice, or otherwise equipped for that purpose, as his boat was, and that from the condition in which he found the *Maryland*, he does not think it would have been prudent for *Taylor*, with a due regard to the safety of his boat and crew, when he met the *Independence* and the *Hunter* in the track, to have turned back and towed them out of the ice, and that the attempt, if practicable, would have been attended with great risk. That said witness also stated, on cross examination, that his boat might have taken said vessels out when it was on the return, but he did not think it prudent, from a regard to the vessels which he had in tow—that on his return the track was closed, having been frozen the night previous. That he thinks it

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from two to two and a half miles from the edge of the ice to the place at which these vessels were lying, and that if his boat had had no vessels in tow, he might have taken them out. That he believes that he did not complain of *Taylor's* refusal to take them out, when informed of it by them, as it was the arrangement between him and *Taylor*, that *Taylor* should take the vessels out which were to be towed down. That on his return, he passed these vessels about seven or eight o'clock, on *Friday* evening, and the weather had then become moderate, and that in his opinion, if these vessels had then made exertion, as the track had been opened by his boat, that they could have got out safely, and that he did not see them make any exertions. That he did say something to them about going down next morning to take them out, but next morning the weather changed, the ice broke up, and it became unnecessary. That when he passed said vessels, they were lying in the ice in safety, and thinks they would not have been injured by driving against the ice, as they were lying alongside of it, and not at any distance from it, and that the vessel might then chafe a little, but would not cut through in twelve or fifteen hours, as the wind, in such a situation, would have no hold on the vessel. That the vessels towed out, paid by the ton, the highest charge for any one being one hundred and fifty dollars, and the whole amount about eight hundred dollars—that from none of the vessels he met, was there any apprehension of danger expressed to him, and that on *Friday* evening, after his boat broke the track, they could have got out with proper exertions.

The defendants after offering proof in corroboration of *Captain Trippe's* evidence, further proved by *Isaac Wilson*, a competent witness on their behalf, that he was the clerk on board the steamboat *Independence*, on the occasion referred to by the other witnesses, and that when the vessels stopped at *Hawkins' Point*, he went to several vessels, for taking which out, the money was not to be paid in *Baltimore*, to collect sums to be paid by them respectively, for taking them through the ice—that his instructions were given to him by *Mr. Mc-*

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Elderry, and were that he should not collect the money until they got out, or nearly out of the ice, but to collect it before they actually got out, so that they might not slip away, and avoid paying altogether, and if they did not get out, the money was not to be paid—that he received from the witness, *Jones*, the money to be paid for towing the said vessels, the *Independence* and the *Hunter*, and that some objection was then made by *Gundry*, to paying before they got out, and that witness believes that he did then say there was no doubt then about their getting out, if they made their fasts secure. That whilst at *Hawkins' Point*, *Captain Taylor* went several times along the line of vessels, and charged them to make their fasts secure. That witness returned in the *Independence*, and met several vessels in the track, and heard no application from any of them to bring them back to *Baltimore*. That he did not offer to return to any of the vessels left in the track, the money collected from them, nor did they ask for a return of it.

The defendants also proved by ——— *Bradshaw*, a competent witness on their behalf, that he was present some time in the spring of 1832, and heard a conversation between *Captain Taylor* and *Captain Gundry*, two of the witnesses, in which *Gundry* stated to *Taylor* that they stripped the said schooner *Hunter*, of her sails, and took some articles out of her, before the storm of *Saturday* morning came on—and that they thought then she was in a sinking condition—and said witness then stated to the jury, that in his opinion, if the *Hunter* was in a sinking condition, as *Gundry* then stated, she would have sunk before she went to the *Kent* shore, where she, in fact, went ashore.

The defendants also proved by *Captain Taylor*, who was re-examined for that purpose, that *Captain Gundry* held with him, *Taylor*, the conversation above stated, by the witness, *Bradshaw*—that on *Thursday* night when the witness, *Jones*, came on board the *Maryland* from his boat in the track, as before stated, *Jones* remarked to him, that the owners of the boat ought to return him his money, as they had not taken

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his vessels out, and that witness then replied to him, *Jones*, that he had no doubt that they would, if he would call on them and ask for it.

The plaintiff in reply to the defendants' testimony, then offered in evidence the deposition of *Traverse* and *Carew*, taken by consent of parties.

These depositions related to the course pursued in taking the vessels out—the difficulties encountered in the ice—the nature and extent of the storm in which the *Hunter* was lost; the refusal and ability of the *Maryland* to take the *Hunter* out before the storm—and the fact that *McElderry* had made other contracts for towing out than for these vessels—and also contained collateral matters contradictory of some portions of the defendants' proof, and proof sustaining the veracity of *D. Jones*.

After all the testimony stated in this bill of exceptions, and the defendants' preceding bills of exceptions (which testimony is all to be regarded as forming a part of this bill of exceptions,) had been offered, the defendants, by their counsel, prayed the court to direct the jury as follows, upon the whole evidence in this cause :

1. That the general object and design of the defendants' charter being to transport passengers and merchandise from *Baltimore* to *Philadelphia*, and *Mr. McElderry* being their agent, that unless otherwise proven, his agency is limited to the business of the company, connected with or relating to such object and design.

2. That the charter granted to the defendants, limits them to the pursuit of particular objects specified in that charter, and that the breaking of ice, and towing vessels through the track thus broken, such vessels being destined for *Virginia*, is not one of those objects about which they could empower their agent to contract, and for which he could contract for them, at all events not without a special power conferred for that purpose, or a subsequent ratification by the company, of such contract.

3. That the evidence offered by the plaintiff, relative to

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the loss of, or injury to his goods on board the schooner *Hunter*, is inadmissible under the declaration in this action for the purpose of establishing for him any claim to damage against the defendants, for such loss or injury.

4. That if the evidence mentioned in the defendants' third prayer be admitted, for the purpose therein mentioned, there is a fatal variance between the causes and manner of the loss of, or injury to, the plaintiff's said goods, as alleged in the plaintiff's declaration in this cause, and the causes and manner of such loss or injury offered in evidence, and the plaintiff is therefore, not entitled to recover therefor under said declaration.

5. If the jury find from the evidence that there was any contract between the parties to this action, or their agents, relative to towing or taking the schooner *Hunter* through the ice from the port of *Baltimore*, yet if they further find that such contract related solely to the taking of said vessel, and not to the transportation of any goods of the plaintiff, on board said vessel, and that there was no agreement between said parties, or their agents, relative to the transportation of any such goods of the plaintiff, then the plaintiff is not entitled to recover in this action for any loss of, or injury to, any goods of his on board said vessel.

6. That if the jury find that the contract between the parties, on which this action is founded, was as is stated in the next preceding, the defendants' fifth prayer, then there is a variance between the contract as alleged in the plaintiff's declaration in this cause, and the contract proved, and the plaintiff is therefore not entitled to recover.

7. That if the jury believe from the evidence, that there was no express agreement on the part of the defendants with the plaintiff, or his agent, to take the said schooner *Hunter* through the ice in safety, and to be responsible to the plaintiff for all losses or injuries which might arise if the said vessel was not carried through in safety, and that the agents of the defendants, in towing or taking said vessel through the ice, used all proper and reasonable care and diligence, and

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such as any prudent man under the circumstances could or would have used in the endeavour to take said vessel through the ice, and that said vessel was detached from the line of vessels towed out, and left in the track along which they were towed, by misadventure, and not from the want of any reasonable care or diligence on the part of said agents; and if the jury further believe, that the said agents, upon their return up the said track, finding the said vessel therein, offered to take her back to *Baltimore*, which was declined, and that in the refusal of said agents to return in the track with said vessel, and in the direction from *Baltimore*, and take her out of the ice in that direction, they, the said agents, did what any prudent master of a steamboat, and having a due regard for the safety of his vessel and crew, under the circumstances would have done, then the plaintiff is not entitled to recover.

8. That if the jury believe from the evidence, that in the endeavour of the defendants' agents to tow or take through the ice from the port of *Baltimore*, the line of vessels with which the said vessel, the *Hunter*, was connected, the *Hunter* was detached from said line and left in or near the track along which said vessels were towed, and that upon the return of the defendants' said agents, up the said track, to the port of *Baltimore*, they offered to take the said vessel, the *Hunter* and her cargo, back to *Baltimore*, and could and would have done so, without injury to the cargo, but that the agents of, or servants of the plaintiff, having the management of the *Hunter*, neglected or refused to embrace said offer, and the plaintiff's goods on board said vessel were afterwards lost or damaged, then the plaintiff is not entitled to recover for any such loss or damage.

9. That if the jury believe from the evidence, that after the said schooner *Hunter*, and the plaintiff's schooner, the *Independence*, were detached from the line of vessels, which the defendants' agents were taking or towing out, and left together in the said track, the hands on board, if they had made due and proper exertions, and such as prudent and

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faithful agents, under the circumstances, would have made, might have taken said vessels and their cargoes in safety through the ice, and that said hands omitted or refused to make such exertions, and the plaintiff's goods were afterwards lost or damaged, then the plaintiff is not entitled to recover for any such loss or damage.

10. That if the jury believe that the defendants did not contract to carry the schooner *Hunter* out of the ice, and out of the harbour of *Baltimore*, to a point of safety in the river or bay below, where the same was frozen, or the navigation was obstructed by ice, by breaking the ice and towing said schooner to such place of safety—that then the engagement of the defendants was merely a contingent engagement, then the plaintiff cannot recover on this nar.

11. That if the jury believe that the schooner *Hunter* could have returned to *Baltimore* with the *Maryland*, or the *Independence*, and that she neglected to do so, and that a loss happened in consequence of this neglect on the part of the master and crew, that the company are not responsible for such loss.

12. If the jury shall believe that a master and crew of ordinary diligence, could, by the exercise of ordinary skill and prudence, have prevented the loss of the schooner *Hunter*, and that they neglected to use such ordinary skill and prudence, and by the neglect thereof, the goods of the plaintiff were lost, that the defendants are not liable for such loss, nor for any damages, except nominal damages.

13. That if the jury believe from the evidence, that the agents of the defendants, in towing or taking the schooner *Hunter* through the ice, from the port of *Baltimore*, used all proper and reasonable care and diligence, and such as any prudent master of a vessel or steamboat, under the circumstances could have used, in the endeavour to take said vessel, the *Hunter*, through the ice, and that said vessel, the *Hunter*, was already detached from the line of vessels towed out and left in the track, along which they were towed by misadventure; and not for the want of any reasonable care or

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diligence on the part of said agents, and without the knowledge of said agents, and that, upon the return of said agents up the said track, they offered to take the said vessel, the *Hunter*, and her cargo back to *Baltimore*, and could and would have done so without injury to the said vessel and cargo, but that the agents or servants of the plaintiff having the management of the *Hunter*, and being aware of the danger of their situation, neglected or refused to embrace said offer, and the plaintiff's goods on board said vessel, were afterwards lost or damaged, then the plaintiff is not entitled to recover for any such loss or damage.

14. That if the jury believe from the evidence, that said vessel was detached from the line of vessels towed out, and left in the track in the manner stated in the next preceding, the defendants' thirteenth prayer, and that there was no express agreement on the part of the defendants with the plaintiff, or his agent, to take the said schooner *Hunter* through the ice in safety, and to be responsible to the plaintiff for any losses or injuries which might arise if said vessel was not carried through in safety; and that the agents of the defendants, in towing or taking said vessel through the ice, used all proper and reasonable care and diligence, and such as any prudent man under the circumstances could or would have used, in the endeavour to take said vessel through the ice, and that said vessel was detached from the line of vessels towed out and left in the track along which they were towed by misadventure, and not from the want of any reasonable care or diligence on the part of said agents—and if the jury further believe that said agents, upon their return up the said track, finding said vessel therein, offered to take her back to *Baltimore*, which was declined, and that in the refusal of said agents to return in the track with said vessel, in the direction from *Baltimore*, and take her out of the ice in that direction; they, the said agents, did what any prudent master of a steamboat, and having a due regard to the safety of his vessel and crew, under the circumstances, would have done, then the plaintiff is not entitled to recover.

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15. That if the jury believe from the evidence, that the agents of the defendants, in towing or taking the schooner *Hunter* through the ice, from the port of *Baltimore*, used all proper and reasonable care and diligence, and such as any prudent master of a vessel or steamboat, under the circumstances could have used, in the endeavour to take said vessel, the *Hunter*, through the ice, and that said vessel, the *Hunter*, was detached from the line of vessels towed out and left in the track along which they were towed, by misadventure, and not for the want of any reasonable care or diligence on the part of said agent, and without the knowledge of said agents, and that upon the return of said agents up the said track, they offered to take said vessel, the *Hunter*, and her cargo back to *Baltimore*, and could and would have done so, without injury to said vessel and cargo, but that the agents or servants of said plaintiff having the management of said vessel and cargo, and aware of the danger of their situation, neglected or refused to embrace such offer, and if the jury further find, that the master of the steamboat, upon reaching said vessel, refused to take her back out of the ice, and that in such refusal, the master did what any prudent master of a steamboat, under the circumstances, and having a due regard to the safety of the vessel under his charge, would have done, then the plaintiff is not entitled to recover for the loss of his cargo on board said schooner *Hunter*.

16. That there is a fatal variance between the causes and manner of the injury of, or loss to the goods of the plaintiff on board the schooner *Hunter*, and the causes and manner of their injury or loss, as offered in evidence, because the proof is that the said goods were not lost or injured, merely by the refusal or neglect of the defendants to carry the said goods safely, agreeably to the contract alleged by the plaintiff, but by the defendants' agents having commenced the performance of the contract, and after taking the said schooner *Hunter* in tow, having left her in the ice, exposed to the action of the wind and weather, whereby she was lost, and also because the proof shows that the said goods were not lost merely by

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the non-performance or mis-performance of the defendants' alleged contract, but by the defendants having left the vessel in the ice, where being left, a storm came up, by which, as the proximate cause, the loss of the said goods was occasioned.

17. That if the jury believe that the vessel or vessels which the *Maryland* had in tow, on her return up the track to *Baltimore*, or any of them, and the vessel or vessels which the *Independence* had in tow, on her return up the track to *Baltimore*, or any of them, and which said boats, the *Maryland* and *Independence* had in tow when they met the *Hunter*, were vessels which the defendants, or their agents, were under contract to tow up to *Baltimore*, on their return from towing down the line of vessels with which the *Hunter* was connected, and that *Dr. Jones*, the agent of the plaintiff, knew that the defendants, or their agents, were under contract to tow such vessel or vessels up the said track upon said return, at the time when *Dr. Jones* made the contract with *Mr. McElderry*, offered in evidence, that then it was an excuse to the defendants or their agents, for not returning immediately, and going out of the ice with the *Hunter*, and leaving the vessel or vessels which the said agents were bringing up the track, that the defendants, or their said agents, were under such contract to bring up the latter vessel or vessels.

18. That if the jury believe from the evidence, that *Mr. McElderry*, with whom the contract offered in evidence by the plaintiff was made, was the general and ordinary agent of the defendants, yet if they also believe that the duties of *Mr. McElderry*, as such agent, extended only to making contracts for the carriage or transportation of passengers or merchandise between *Baltimore* and *Philadelphia*, or to or from any intermediate points in the line of the transportation between said termini—and if they also believe, that the contract offered in evidence, for the employment of the boats of the defendants, in towing the *Hunter* out of the ice, was one which was entered into solely for the purpose of towing out vessels going to *Virginia*, or down the *Chesapeake bay*, that

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such contract had no relation to and was not a part of the business of the defendants in establishing and conducting a line of steamboats, or other vessels, stages or other carriages between *Philadelphia* and *Baltimore*, for the conveyance of passengers and the transportation of merchandise and other articles, then the said *McElderry* was not authorized to make said contract for and on behalf of the defendants, or at least that he was not authorized to make it, and the plaintiff is not entitled to recover thereon against the defendants, unless the said *McElderry* had special authority from the defendants, or the president and directors of the *Pennsylvania, Delaware, and Maryland Steam Navigation Company*, to make such contract, or unless the said contract was subsequently adopted or sanctioned by the defendants or the said president and directors.

19. That if the jury believe that the contract between *McElderry*, as the agent of the defendants, and *Dr. Jones*, the agent of the plaintiff, of which the plaintiff has offered evidence, was in its nature, and as to its objects, such as is stated in the next preceding, the defendants' eighteenth prayer, then such contract was not within the scope of the chartered power of the defendants, which charter it is agreed is in evidence in this case, being the act of 1825, ch. 179, and the plaintiff is not entitled to recover thereon, even if the jury should believe that the said *McElderry* was authorized by the defendants to make the same, or that it was adopted or sanctioned by the defendants.

Of which foregoing prayers of the defendants, the court granted the fifth, sixth, ninth, tenth, and twelfth of said prayers, but the remaining of said prayers of the defendants, and all and each of them, to wit: the first, second, third, fourth, seventh, eighth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth prayers, the court refused to grant, but gave to the jury the following opinions and instructions:

1. If the jury believe the contract to be as proved by *Dr. Jones*, that *Jones* was the agent of the plaintiff, and *McEl-*

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derry of defendants, and that the defendants, although they commenced towing out the *Hunter*, yet by the giving way of the fastenings of the vessels, the *Hunter* was thrown loose, and left behind in the ice, and that being so thrown loose, was not attributable to the vessels entered by *Dr. Jones*, and that all reasonable exertions were made by the *Hunter* to get out of the ice, and free from danger of ice, and that said exertions were ineffectual, and that the cargo of the *Hunter* was partially lost and damaged in consequence of the failure of the defendants to comply with their contract, and in consequence of being left in the ice, then the plaintiff would be entitled to recover in damages, to the extent of the injury he sustained in his goods.

2. But if the jury believe the above facts, and that reasonable exertions were not made by the *Hunter* to free herself from the ice, and that she might, by such exertions, have escaped danger, the plaintiff cannot recover for the loss or injury of his goods.

3. If the jury believe all the facts contained in the court's first direction, except that reasonable exertions were made by the *Hunter* to clear herself from the ice, which the jury should believe were not made, the plaintiff would in that event be entitled to nominal damages.

4. If the jury find from the evidence, that the contract to carry the *Hunter* and her cargo out of the ice, as proved by *Dr. Jones*, was made by the defendants' authorized agent, *Mr. McElderry*, with *Dr. Jones*, as the authorized agent of the plaintiff, and if they also find that the *Hunter* and her cargo were lost in consequence of being left in the ice by the defendants' agents, on *Thursday* night, and being driven ashore as is given in evidence by plaintiff; and if they also find that the defendants or either of their agents, the steamboat *Independence* or *Maryland*, could have carried them out of the ice before the storm began or said loss occurred, by reasonable exertions, that then the plaintiff is entitled to recover, and that it is no excuse to defendants for not taking the *Hunter* out of said ice, that their said agents had, after

entering into said contract to carry her and her cargo out of the ice, entered into other contracts to bring other vessels to *Baltimore* from the *Chesapeake* bay or elsewhere, which they could not have complied with had they stopped to take the *Hunter* out of the ice, provided the jury believe that reasonable and proper exertions were made by the officers and crew of the *Hunter*, to extricate the vessel and cargo from danger from the ice, and provided the jury further believe that the loss proceeded from injuries inflicted by the ice while she was detained in the track, either in her efforts to get out of the danger, or from the storm driving the vessel against the ice, or by being left in the ice by the agents of defendants, from which she could not extricate herself.

5. If the jury believe the evidence of *Dr. Jones*, in relation to the contract for carrying out the *Hunter* and her cargo, and if they also believe that one of the said agents of the defendants, acting as such on board the steamboat *Independence*, when said boat was with the *Maryland*, and under said contract engaged in taking out said vessel and her cargo, and the rest of the vessels then towed out of the ice by said steamboats, including the other vessel of plaintiff, the schooner *Independence*, whilst lying at *Hawkins' Point* in the way down with said boats collected the money agreed to be paid by *Dr. Jones*, as agent of plaintiff, with *Mr. McElderry*, as agent of defendants, and afterwards paid over said money to defendants; and if they also believe that the defendants have ever since retained said money, as also, all the other money that was received by said *McElderry*, or the other agents of defendants, from the other vessels towed out of the ice at the same time by the two steamboats, the *Maryland* and the *Independence*, that then said facts are in law, an adoption of the contract under which said money was paid by plaintiff, and that said contract is as binding on defendants as if there was clear evidence of a precise authority from defendants to *McElderry*, to enter into said contract on their account. To which refusal of the court to grant said rejected prayers of the defendants, and to which refusal as to

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each of them, and to the granting of which said opinions and directions by the court, and of each of them, the defendants excepted and appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and DORSEY, CHAMBERS, and SPENCE, Judges.

DEFENDANTS' CHARTER—Act of 1825, ch. 279.

SECTION 1. *Be it enacted*, That ——— and others, their associates, successors, and assigns, be, and they are hereby created and made a corporation and body politic, by the name, style, and title of *The Pennsylvania, Delaware, and Maryland Steam Navigation Company*, and by that name, style, and title, shall have perpetual succession, and shall be able and capable in law to sue and be sued, to plead and be impleaded, answer and be answered in any court of law or equity; to make, have, and use a common seal, and the same at pleasure, to change, alter, and renew; and generally to do all such acts as shall be proper and necessary *for the purpose of establishing and conducting a line or lines of steamboats, vessels, and stages, or other carriages, between Philadelphia and Baltimore, for the conveyance of passengers and transportation of merchandise and other articles.*

SEC. 8. *And be it enacted*, That the directors or a majority of them shall have full power to appoint and employ, and in their discretion to remove or dismiss a secretary, treasurer, and all such other officers, clerks, agents, mechanics, labourers, and servants, as they shall deem necessary from time to time, to attend to and transact or execute all the affairs and business of the company, and fix their compensation, to contract, agree for, and purchase, rent, or hire, all such lands, chattels, materials, rights, privileges, and effects whatever; and to make and repair or cause to be made and repaired all such *roads, wharves, boats, vessels, carriages, and other conveniences* as they shall deem necessary for effecting the objects of the company, and the same or any part thereof in their discretion to sell or otherwise dispose of; to call for monthly

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or other instalments of the stock not exceeding ten dollars on each share per month, on at least two weeks' notice being given, to apply the said instalments when received, and all other funds of the company, so far as may be necessary to effect the objects aforesaid, and in payment of the necessary expenses of the company, and to pass all such resolutions and by-laws as may be necessary to carry into effect the powers vested in them by this charter, and the said resolutions and by-laws, to alter, repeal, annul, or renew—subject nevertheless to the revision and control of the stockholders in the manner hereinafter provided.

GLENN, for the appellants, contended :

1st. The first question in the case relates to the admissibility of the proof of the loss, and is presented by appellants' first exception. Under this exception the counsel for the appellants insists, that the testimony was inadmissible for the reasons there specially assigned, and also because the goods alleged to have been lost are not sufficiently described in the declaration to entitle the plaintiff to offer evidence of their loss, or recover their value in this action ; and that the court below erred in receiving the said testimony ; on this question he cited : 1 *Chit. Plea.* 371, 319. *Ib.* 440, 442. *Archb. on Plea.* 170, 171. 2 *Lord Ray.* 1007. *Ib.* 1401.

2d point.—This arises under the appellants' second exception, and relates to the admissibility of the testimony of *McElderry*, the agent of the defendants, with whom the contract, upon which the plaintiff sues, was in fact made—and under this exception the counsel for the appellants contends that *McElderry*, although a stockholder in the *Pennsylvania, Delaware, and Maryland Steam Navigation Company*, was yet competent as the agent of the defendants to prove for the defendants the contract made by him as such agent, and that the court below erred in rejecting his testimony. *City Bank vs. Bateman*, 7 *Har. and John.* 104, 109. *Union Bank vs. Ridgely*, 1 *Har. and Gill*, 408. *Pal. on Agen.* 279, 280. *Theobald Agen.* 318, 319.

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3d point.—This arises under the third exception, and relates to the admissibility of the testimony of the witness *Norris*. And the appellants' counsel will contend that said testimony was admissible for the purposes specially stated in their said exception, and also as a part of one and the same transaction or enterprise out of which grew the contract with the plaintiff, tending to illustrate the origin and objects of the whole enterprise, to show the responsibilities which the defendants intended to assume under their contracts connected with said enterprise, and to show the want of authority in the agent, *McElderry*, to make the contract on behalf of the defendants as proved by the witness, *Jones*, to be responsible for the hazards of the enterprise. For which reasons they will contend that the court below erred in rejecting this testimony.

4th point.—This is raised by the third and fourth prayers in appellants' fourth exception, and presents the same questions which are stated under appellants' first point, excepting that the fourth prayer conceding the testimony to be admissible, calls upon the court to say, that the proof offered of the causes and manner of the loss of the plaintiff's goods does not correspond with the causes and manner of the loss of the same as alleged in the plaintiff's declaration. And under this it will be contended, that the declaration limits the plaintiff to proof of a loss resulting directly from the defendants' refusal or neglect to perform their contract. That the allegation of nonfeasance does not entitle the plaintiff to offer proof of a misfeasance, and that there is a fatal variance between them, and that even if proof of misfeasance were admissible under the declaration, yet as the evidence when introduced shows that the loss did not result directly from such alleged misfeasance, but from the action of a storm as the proximate cause to which the vessel was exposed by the alleged failure of the defendants to perform their contract, the proof does not correspond with the declaration, and that for these reasons the court erred in rejecting said prayers. 1 *Chit. Plea.* 319. 3 *Stark. Ev.* 1557. 2 *Kent*, 443. *Doane vs. Badger*, 12 *Mass.* 69.

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5th point.—This is presented by the appellants' first, second, and eighteenth prayers in fourth exception, and relates to the authority of *McElderry* to bind the defendants by the contract sued upon. Under these it is contended, that *McElderry*, as general agent of the defendants, had no authority to bind them by said contract; that said contract had no relation, and was no part of the business entrusted to him under said general agency; that the contract was without the scope of the charter powers of said defendants, and therefore not within the scope of his general agency, and that therefore the court erred in rejecting these prayers. *Theobald on Agen.* 259, 302. 1825, *ch.* 279, *sects.* 1 and 8. *Wyman vs. Hallowell Bank*, 14 *Mass.* 58.

6th point.—This arises under the appellants' eighteenth and nineteenth prayers, and relates to the competency of the defendants under their charter to make the contract sued upon. Under these it will be contended, that said charter did not give the defendants authority to make the contract, and that they may defend themselves in this action under such want of authority, and are not estopped by the contract from alleging the want of power to make it. Under the charter, the company could not run to *Virginia*, nor interfere with other companies. Powers arising from express grant cannot be extended by implication. 2 *Kent*, 239–40, and cases there cited. When a corporation is authorized to act in a particular mode, this is a prohibition against acting in any other mode. *Broughton vs. Salwood Water Works*, 5 *Serg. and Low.* 216. *New York Firemen's Ins. Co. vs. Ely*, 2 *Cowen*, 699. *Jackson vs. Campbell*, 5 *Wend.* 572. A contract by a corporation does not estop her from calling it into question. This would seem to result from the necessity of acting through agents to whom no more power could be communicated than the charter authorized; the power of the company may be likened to the right of an individual to show a contract illegal, as against the provisions of the statute law or fraudulent; and the reason is stronger, as the other contracting party has the means of ascertaining the power of the

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company by a reference to the charter. *Clark vs. Mayor of Washington*, 12 *Wheat.* 40.

7th point.—This is presented by the fifth direction of the court, and relates to the court's opinion as to what amounted in law to an adoption by the defendants of the contract made by their agent, *McElderry*. In opposition to this it will be contended, that the mere receipt of the money under the contract was not an adoption, unless the defendants or their agents received and retained it under a knowledge in fact of the contract actually made with *McElderry*, and that the said *McElderry* had transcended his authority in making it, or inserting stipulations in it on behalf of the defendants, incurring responsibilities for them, which he was not authorized to assume for them. *Owings vs. Hull*, 9 *Peters*, 629. *Beall, et al vs. Cunningham*, 3 *Peters*, 69.

8th point.—This relates to the duties and responsibilities of the defendants or their agents under the contract in question. Upon the *hypothesis* that it was not an express contract to carry the vessel through the ice in safety, and to be responsible for the hazards of the attempt to tow the vessel through the ice, and is raised by the appellants' thirteenth and fourteenth prayers, or rather by the fourteenth prayer, which embodies in itself the assumed facts of the thirteenth. The same question is raised but not so fully by the seventh prayer.

Under these prayers it will be contended, that the defendants, if such was the agreement, were responsible only for ordinary care and prudence in the performance of said contract, or at least only for the degree of care and prudence mentioned in the prayers, and that under the state of facts assumed in said prayers they were not answerable for the loss of the plaintiff's goods. *Caton vs. Rumney*, 13 *Wend.* 389.

9th point.—This relates to the obligations of the contract, if even a contract to carry safely through the ice, and questions relative to it are presented by the appellants' thirteenth and fifteenth prayers. The prayers themselves exhibit distinctly the propositions for which we shall contend.

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10th point.—This relates to the defendants' excuse for not returning immediately with the *Hunter*, upon finding her in the track, in the fact that the defendants' vessels were engaged in towing other vessels up the track, under a previous contract known to the plaintiff. The prayer (seventeenth,) sufficiently states the propositions to be contended for.

11th point.—This arises under the motion in arrest of judgment, and the reasons are there sufficiently stated. 1 *Chitty Plea*. 321, 351, 353. 1 *Saun. P. and E.* 158. *Cooke vs. Simms*, 2 *Call.* 39. *Chandler and Hart vs. Rossiter*, 10 *Wend.* 487.

JOHN SCOTT, for the appellee, contended :

That the declaration was good in substance ; corresponded with the contract proved, and that the motion in arrest came too late. He cited *McKinstry vs. Solomons*, 2 *John.* 57, 62. *Diblee vs. Best*, 11 *John.* 114, 117. 4 *John.* 237, 239. *Close vs. Miller*, 10 *John.* 94. He insisted that this was a case of nonfeasance, and not of misfeasance ; that the object of pleading was to prevent surprise, and as the declaration covered all the goods on board the *Hunter*, more particularity was unnecessary and unreasonable. The case of *Boyle, et al vs. Laughlin*, in 4 *Har. and John.* 291, shows the responsibility of carriers, and is applicable to this case.

The fifth point on the fourth exception, including the first, and second, and eighteenth prayers of the defendants, rests upon the authority of *McElderry* to make the contract. After referring to the proof of his agency and the character of it, the counsel contended there was no difference of opinion as to the general rules regulating the conduct of general agents, but in this cause the agent had the authority to make the contract, or if not the defendants had adopted it. That adoption might be by parol—all the facts show the co-operation of the company in every part of the transaction. The use of their boat, hands and property, with the knowledge of the defendants engaged in this transaction. The business of the defendants was connected with commerce and navigation.

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The mode of transportation was immaterial. It was along their line of travel, and there can be no difference between carrying the merchandise and towing the vessel which contained it.

Upon the sixth point he contended, that wherever there was an affinity between a charter and the practice under it, no harsh rules of construction were to be set up to deny the validity of the company's acts, and this principle answers the cases cited.

There is a distinction between a corporation endeavouring to enforce a contract, which it was not authorized to make, and being liable for a contract which it had improperly made. It is settled that they are liable for torts committed by their officers.

Upon the questions of the competency of the witnesses and admissibility of declarations under the second and third bills of exceptions, he cited, *Kemp vs. Baltimore Fire Ins. Co.* 2 *Gill and John*. 108. *City Bank vs. Bateman*, 7 *Har. and John*. 104, 109, 110. *Union Bank vs. Ridgely*, 1 *Har. and Gill*, 325, 408. 2 *Stark. Pr.* 4, 752. *Boyle, et al vs. Laughlin*, 4 *Har. and John*. 291.

R. JOHNSON, for the appellee, further contended :

It is important to consider the points on which this cause went to the jury—for though some prayers were rejected in form, they were granted in substance.

The objections to the declaration only arise upon the motion in arrest of judgment.

In the *first* exception the proof of the contract by *Jones*, is stated, not as offered, but as proved to the jury—part of the exception relates to proof given, part to proof offered to be given. The objection below was to the part offered as inadmissible. The proof of the contract was received without objection, and the objection actually made was to the proof of its violation.

The third prayer in the fourth exception relates to the breach under the pleadings, and assumes the existence of the contract.

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The fourth prayer in the same exception also admits the contract, and insists upon a variance between the *breach* of the contract alleged and the *breach* as proved.

The first exception admits the contract, and the third and fourth prayers relate to the violation of it, admitting its existence, and yet they have been erroneously argued, as if they presented in this court the same questions.

Then the contract as proved by *Jones*, is in the cause, without objection, and *it was to carry in safety, through the ice, the Hunter and her cargo.*

The fifth, sixth, ninth, tenth, and twelfth prayers were granted.

The fifth prayer is confined to the vessel. The sixth prayer also supposes the contract relates only to the vessel.

Under the tenth prayer the jury were instructed, that if they did not find the contract as proved by *Jones*, the plaintiff could not recover.

I maintain that if the cause was put upon its true legal ground to the jury, this court will not reverse the judgment.

1. The cause was put upon the contract, if believed by the jury.

2. The plaintiff was bound to satisfy the jury by evidence, that the loss did not arise from the want of reasonable exertions to save the property on the part of his agents.

3. With reference to the proximate cause of the loss, the success of the cause depended upon the want of reasonable skill in defendants' agents, and although the plaintiff used all reasonable skill, the loss resulted from the ice.

4. The immediate cause of loss put to the jury was the failure of the defendants to comply with their contract.

That the steamboats could have taken the vessel out by reasonable skill, is the hypothesis upon which the cause went to the jury, and if this could not have been done before the storm, the verdict must have been for the defendants.

The *fifth* instruction informed the jury, that if *McElderry* was a general agent of the company, still they must find a subsequent ratification of the contract, which was equivalent

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to an original grant of authority. The facts amount to a ratification, and are equivalent to an original express authority.

The argument then which places the cause upon the want of original authority to make the contract, and no ratification, must fail; for the question of ratification went to the jury who found it.

My object is still to show the actual points decided below. I call the attention of the court to the thirteenth, fourteenth, and fifteenth prayers.

The thirteenth prayer concedes that all reasonable efforts to take the schooner were necessary, and proposes that if the defendants' boats on their return to *Baltimore*, could have brought the *Hunter* back, and were prevented by the plaintiff, that this is an excuse. It in fact offers a violation of the contract as an excuse.

As to the fourteenth prayer, two grounds exist for sustaining the court's refusal to grant it.

1. The defendants considered it incumbent on the part of the jury to find an express and positive agreement on the part of the company to be responsible for the loss. It conceded *Jones'* proof of the contract, and that although the jury might find the defendants responsible in fact, still not liable.

2. The court granted it substantially by the tenth prayer and subsequent instruction.

The question of the contract, if embraced at all, is under the first and fourth prayers.

The first relates to the proof of the loss and want of description of the goods lost.

The fourth concedes the contract to be in evidence, and asks the court to decide upon its effect and the manner and proof of the loss.

It is evident so far as the first exception, and third and fourth prayers of fourth exception are involved, the contract as proved by *Jones*, was in evidence. The questions made were upon the breach, and the whole cause turned upon the fact of the finding of the contract, as proved by *Jones*.

The cause must be tested by the prayers actually granted

by the court. We are not to consider all the prayers made, but the granted prayers and the instructions objected to below.

The law of the cause is to be found in the fifth, sixth, ninth, tenth, and twelfth prayers and the court's fifth instruction; and if the law there found be the law of this cause, there can be no error for a misdirection.

Three classes of objections are relied on.

The *first* assumes that in proof, the plaintiff has established a cause of action, by making out a contract and breach, but objects to the right to recover, because the pleadings in the form of action adapted are not legally sufficient.

That class embraces points upon the first exception, and upon the third, fourth, and sixteenth prayers of the fourth exception.

The *second* class presents as a defence, that the making of the contract was a violation of the corporate power, which prevents the plaintiff from recovering against the corporation. It relies upon an asserted wrong to get rid of a contract for consideration.

This includes first, second, eighteenth, and nineteenth prayers under the fourth exception, and fifth and sixth points of the statement.

The *third* class presents objections on the merits; admitting a contract and relying upon its performance or a sufficient legal excuse for non-performance.

This embraces seventh, thirteenth, fourteenth, and fifteenth prayers of the fourth exception, making the eighth and ninth points of the statement and the seventeenth prayer, which constitutes the tenth point of the statement.

The *fourth* class of objections relate to the admissibility of the proof and the points which arise on the motion in arrest.

I propose to examine the second and third exceptions.

McElderry was a stockholder of the defendants' company. The general question involves the inquiry whether a stockholder in a private corporation can be a witness in its behalf. All that this court has decided in the three authorities cited,

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is that a stockholder may be compelled to testify against a corporation. The general rule, 1 *Stark. Ev.* 105, 106, is that interest disqualifies a witness. The result of the case is, that if the judgment operates upon a fund in which the proffered witness has an interest, he is not competent. It does not depend on the extent of that operation. The law does not distinguish between that which will or will not operate on the witness himself, *Angel and Aimes*, 390. The exceptions relate to public corporations, in which the witness has no immediate personal interest. But the case of *Union Bank vs. Ridgely*, 1 *Har. and Gill*, 408, decides that the witness is only competent when within some settled exceptions. Then is this case an exception as argued on the other side? The fact to be disproved was the contract proved by *Jones*—and that the witness was the general agent of the defendants was the ground of the exception. If that constitutes an exception in this case, it constitutes an exception in all cases, consequently in the case of partners, and especially where *all* are not sued, and the one not sued is the person who made the contract, he becomes a witness *ex necessitate*. So of joint executors. Let it not be said, that in these cases the witness offered was contracting for himself, for such an exposition would let in legatees acting as agents for executors. The fallacy consists in a total misapprehension of the rule. The rule is that the evidence of the agent is let in in despite of the interest he has as mere agent; but as soon as the witness has any other interest, than that of agent, he is disqualified, and this construction covers all the cases. The exceptions must be established by *decided* cases. That in 1 *Har. and Gill*, 408, is an exception from necessity; for none but a corporator can have possession of the muniments of the corporation.

In the consideration of the third exception, it will be recollected that proof of the contract was admitted without objection. The arrangement referred to in *D. Jones'* evidence was mere inducement to the contract. He was ignorant of its particulars. *Taylor* proves that *Meeteer* declined making

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any contract, and all that *Jones* proved was *his two vessels* were to be carried out. If the cause depended on *Taylor's* evidence then no contract was proved. *Taylor* had no interview with *McElderry*, nor was *Jones* advised that any contract had been made by which the company was to be responsible. Then as to the evidence offered through *Norris*, not one word relates to the contract proved by *Jones*, and admitted to the jury. Upon general principles the evidence of *Norris* was not admissible. *Boyle, et al vs. Laughlin, 4 Har. and John.* 291, 395. Each vessel had a separate contract made by his owner; one contract could reflect no light on the other unless it was brought home to the contracting parties. *Norris'* proof was not necessary to reconcile the proof of *Jones* and *Taylor*, for there was no contradiction between them, and we are not to suppose a contract for the purpose of admitting *Norris'* proof.

Under the first exception, and third, fourth, and sixteenth prayers, the objections relied on relate to a want of enumeration of the goods lost; and that the proximate cause of the loss, the storm, was not stated.

No distinction is taken between contracts verbal or in writing. It being a contract which could subsist verbally, the rules of pleading are the same. Then it results, that if a party in writing promises to carry a vessel and cargo, no *nar* is good which does not particularize the cargo. This is the objection relied on.

There are two great rules in pleading which provide :

1. That the defendant may not be taken by surprise by general pleading, letting in proof which he could not have anticipated.

2. That the judgment which may be pronounced upon a particular *nar*, may not enure to the benefit of the party in another action.

Now it is competent to declare generally for goods sold; though it is said not for goods destroyed. In an action on a policy for cargo, the particular cargo need not be described. In an action flowing from contract where the breach is a tort,

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the goods it is said must be particularized. Why this distinction? The judgment is conclusive upon all subsequent actions upon the same contract; but as torts are several, and several may arise in the same transaction, hence the rule. To gratify the rule of justice, the defendant here is entitled to such a statement as reasonably informs him what he is called upon to answer; why then should a contract to carry a ship and cargo be more particularly stated than a policy on the same property? The proof *quoad* the cargo is the same in both cases. The general designation is warranted by principle in both cases. The defendant is entitled in both cases to such a description as would make the judgment conclusive upon his contract. Under this contract there can be but one non-performance. A recovery which alleges non-performance, forever puts this question to rest; with reference to the breach the judgment must be conclusive. The plaintiff cannot divide his contract so as to entitle himself to several suits. There is this difference between contracts and torts. Where the averment is descriptive of the contract, it is fatal not to establish it by proof; not so as to torts. Now if the rule is so, if obliged to describe the cargo here, a mistake in describing either what is or what is not on board, would be fatal. In an action for freight the articles are not described. The contract is to carry; and the rules of pleading which guard against surprise and make the judgment conclusive, apply to this case. The courts must not so construe these rules as to lead to practical inconvenience. The rule contended for by the defendant will apply to mixed cargoes, and of any extent. It leads to complexity.

But even in tort, a case like this, it would not be incumbent on the parties to use any other terms than the party has here adopted. That which is agreed by stipulation to be the designation, shall be so throughout; and it is not like the case of injury, independent of contract, for there the description is the only notice the defendant has.

The variance between the contract proved and alleged is not open on the record.

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1. It is said the breach proved is misfeasance, and not non-feasance, as alleged.

2. That the proximate cause charged is not proved, while that which is proved is not admissible.

Upon the first objection I contend there can be but one non-performance; and consequently every breach of misfeasance is non-performance. Under the contract every hour of continuance in the ice was an hour of non-performance. The contract being to take the schooner out of the ice; the contract is not performed so long as she is in the ice.

Our opponents suppose that if the vessel was taken a short distance into the ice, that a failure as to residue is an act of misfeasance. Now such an objection relates merely to the degree or extent of performance, but it is still non-performance. If the plaintiff had declared for a misfeasance there would have been a variance.

The second part of this division refers to the statement of the loss in the *nar*, and proof refers to the sixteenth prayer, and is to be considered in connection with the court's fourth instruction. It obliges the jury to find, that the vessel and cargo were lost by being left in the ice by defendants—and that the ice caused the injury, either by *itself* or by detaining the vessel until the storm arose.

Now the contract was to carry the vessel out of the ice—all damages from ice, however acting, produces the same liability. Under the court's opinion the ice either directly or remotely must be the cause of the injury. If it be necessary to describe the cause of the loss, every part of it must be detailed. *Broughton vs. Salford Water Works*, 5 *Serg. and Low*, 216. If the object of the allegation is to give notice of the ground of loss, and a special mode of stating the loss is necessary, then no partial cause, operating to produce a loss, could be given in evidence unless pleaded. As to special damages, see 1 *Chitty*, 386. *Archb. Plea.* 170. The cases where special damages are required to be averred, are those where the damages are not the legal consequence of violations of the plaintiff's contract. Legal consequences are

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not the subjects of pleading. Practically they are averred by the general allegation of tort in slander: but if you sue for a tort, not in itself actionable, special damage must be averred. The cause of action is the special damage. In other cases, if the thing charged legally tends to damage, no special damage need be alleged. Here we are suing on a contract; a violation of it gives as a legal consequence a right to damages, *per se* a cause of action. The extent of the damages sounds in evidence; and all that was necessary to aver was a violation of the contract.

The first, second, eighteenth, and nineteenth prayers involved two questions.

1. Whether *McElderry* was authorized in fact to make a contract; which admits the authority of the corporation so to employ him.

2. Was it an authority which the company had power to grant?

It is shown in proof that he was general agent, and authorized to contract with reference to the steamboats. A general agent to contract is authorized to enter into all contracts which his principal might make. The limitations of his power are *inter se*. If he acts as general agent and so holds himself out, his power is to be considered without limitation, so far as the world is concerned. He binds his principal without ratification. Then there is evidence to show a legal contract between plaintiff and defendants.

The fifth instruction actually given puts an end to this inquiry. The receipt of the money from the agent, who had received it *qua* agent, and retained by the principal is an adoption of the contract.

In what is the fifth instruction without proof? The fact of the collection of the money is proved by a clerk and agent of the defendants. Its non return to the plaintiff is proved by the absence of proof of a return. Then was the money paid over by the agent? It is immaterial whether the defendants actually received the money, or knowing it to be in the hands of one of their agents suffered it to remain there. Acquies-

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cence in case like this, by the principal, is evidence of adoption. The authority to contract is conceded. It cannot be denied that some species of contract was entered into for the employment of their steamboats. *Taylor*, who denies that he contracted with the owners of the towed vessels, admits that he contracted with the defendants. A contract out of the usual course of their business; a contract to carry is conceded. Its terms and extent are in dispute.

The eighteenth prayer was properly over-ruled, unless it could be responded to yea or nay. It contained three distinct propositions. If either was wrong, the court was right in rejecting it. It must be considered with reference to the case made. It applies to the whole action, but in law does not cover it, as the jury might find other facts from the evidence consistent with it, and which still would be an answer to it. In this part of the case, the charter is out of consideration. The defence relied on is a private limitation of the power of the agent, and the plaintiff cannot be referred to that as engrafting a principle upon it, when he was ignorant of the fact.

Corporations may be guilty of a tort, and as they can only act by agents, they must be liable for torts committed by their agents. *Angel and Aimes*, 220. *Gray vs. Portland Bank*, 3 *Mass.* 364. Whether the tort was committed in the execution of one of the powers of the corporation is not material; for in such case the charter would not convey an authority to do wrong.

The doctrine contended for is, that a company who are common carriers within certain termini, may get clear of a responsibility of the same description, on the ground that they were not within their termini; although they received and retained payment for the carriage. The only cases proceeding upon such ground must be when the contract was repudiated, and not when the company hold on to its fruits. Whether the contract was to carry is not material on this question. The objection is, that it relates to a contract out of the limits of the charter. The ground of the decisions in

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such cases must be that it would be unjust to visit upon innocent stockholders, the consequences of acts not within the scope of their charter; and consequently not within the power of the company's agents. But still, I wish to see the cause which decides, that a corporation is not to be visited with the consequences of fraud and contrivance. The same rule must apply to corporations as to individuals. A stockholder would say that he looked to the charter and appointed his agent. He denies his contract, and this would be a fraud, if upon such contract he took the money of the other party. *Chesapeake and Ohio Canal Co. vs. Baltimore and Ohio Rail Road Co.* 4 *Gill and John*. 1. The entering into an unauthorized contract is no destruction of the franchise, and the consequence is, that the corporation would reap the benefit of both legal and illegal contracts. *Chester Glass Co. vs. Dewey*, 16 *Mass.* 94, 100, 102. The consequences of illegal contracts by corporations are not matters to be urged by the contracting parties, but they act against the legislature who created the grant, and have the power of punishment. Let us look at the mischief of the doctrines maintained by this company. The agent purchases wood to carry out this contract. Its object is not covered by the charter. The incidental contract must fall with the principal one. Suppose the company had received the consideration of the principal contract, void as is contended, would it have to fulfil the incidental contracts which enabled it to earn the money? If the doctrine is sound, all the ancillary contracts are void. There can be no degrees as to want of power. Great and small, principal and ancillary contracts are all void, if any be void, for the want of power under the charter of the corporation party to a contract.

The motion in arrest of judgment rests on four grounds, all of which relate to the sufficiency of averments in setting forth the contract and describing the property injured. As to any defect or inaccuracy in assigning a breach this is aided after verdict. The court will then intend that a sufficient breach was proved. *Bartlett vs. Crozier*, 15 *John*. 250. A

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failure in the description of the property is also aided after verdict.

Other objections insist upon a failure of consideration, or of averments to show a consideration paid. We are to look at the contract set forth. Is it void for want of consideration? This does not relate to the form of the averment. If it was a promise binding on the part of the defendants, the corresponding stipulation on the part of the plaintiff being complied with, no doubt of its validity—as far as this question is concerned, it is immaterial what form of averment shows the acceptance of the defendants' part of the contract. The plaintiff's vessel is embayed by ice—the defendants know it—they say, pay us a certain sum and we will take her out—and the plaintiff requested them to take her. Now what is this but an engagement to pay the money? If upon performance of the work the plaintiff was bound to pay, and the plaintiff accepted the contract, this makes it a binding contract. The plaintiff could not set up a want of consideration. It is a case of promise for promise. The nar shows a consideration "to be paid by the plaintiff." This is a promise to pay by the plaintiff. It is the consideration money to the defendants. And taking the two allegations together, it constitutes an undertaking on the part of the plaintiff to pay the consideration. The objections yield a sufficient consideration, but insist upon a condition precedent, and that it should appear that it was performed or offered to be performed. But this is not a condition precedent; so far from it that only performance by defendants entitled them to the money. Averment of tender was therefore unnecessary. An offer to pay was also unnecessary, for the defendants refused to proceed with the contract. *Allegre vs. Maryland Ins. Co.* 6 Har. and John. 408. That the variance must be taken advantage of at the trial. *Pike vs. Evans*, 15 John. 210. That the averment of the consideration here was no condition precedent. *Barruso vs. Madan*, 2 John. 149. Not error if the jury was substantially instructed correctly. *Bosley vs. Chesapeake Ins. Co.* 3 Gill and John. 450, 472, and

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that it is not the duty of the court to do more than respond yea or nay to a prayer. *Maryland Ins. Co. vs. Bathurst*, 5 *Gill and John*. 225.

McMAHON in reply, for the appellants.

There are preliminary considerations in this case appearing from the proof, which shew the justice of this appeal. The origin and nature of the enterprise and the motives which led to it. It was for the benefit of commerce and did not pay any profit to the company, nor was it to be at any risk. The attempt to carry the vessels out was considered hazardous and of doubtful success. No compensation was to be paid if not successful. In its outset and in all its characteristics it was a public spirited enterprise; but they did not become insurers for its success or safety. The agents of the plaintiff entered into this contract with full knowledge, that the company did not mean to become insurers. With this knowledge the plaintiff's agent contracted with the defendants' agent, and in opposition to notice from the president of the company. In his uni-lateral contract, the plaintiff objected to paying until he got clear of the ice or upon the assurance that all danger was past. The company upon his construction would have to pay the loss without any premium. As regards the claim for consequential injuries, the loss flowed from a refusal to adopt the means of escape after being awakened to a sense of danger; it is attributable to their own obstinacy. And in such a case the plaintiff objects to the company proving by the only means in their power, the agent who made the contract, the true nature of that contract. With these remarks I proceed to the first exception, and this objects to the admissibility of the evidence of *Jones*, *Gundry*, and *Treacle*, under the pleadings in this action. The declaration relies upon an undertaking to carry the *Hunter* out of port. There is no averment that the company had taken possession of the schooner for the purposes of the contract. It stands upon a simple contract of bailment, unaccompanied with a delivery. Delivery to

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the bailee is not averred, and therefore could not be proved. The contract is proved, but proof of delivery to or conduct of the bailee is material, but neither is averred. Our objection is not to the assignment of the contract nor the breach of it, but to the insufficiency of the assignment of the damages sustained. The damage itself is not sufficiently assigned. The cause of damage is not sufficiently assigned or it is misalleged. This objection was made at the very first period it was competent to make it. There was no laying by; but it is taken at the threshold. As authorities to illustrate the distinction between general and special damages in pleading and proof, 1 *Chitty Plea*. 370, 440, 442, 443. 1 *Saun. P. and E.* 165. *Arch. Civ. Plea*. 170. 1 *Chitty Con.* 340, 345. Special damages are independent of contract, beyond the contract, and arise from contingent causes; the storm is such a cause. It may or may not arise. Those damages are contingent, which the law does not imply. Their existence must be shown. These effects must be proved, and liability for them must be averred. The books say it must be specially averred; its circumstances set forth, that the opposite party may be prepared to meet them. General damage is not traversable, but special damage is. The elements of special damage include, first, the action of the cause—second, that the cause produced the loss, and third, the responsibility of the defendants for it; as to how far it must be alleged, see 2 *Chitty Plea*. (edition of 1833,) 272, 317, 362, 367, 672, 675, 682. When a fact is to be stated it must be stated to a certain intent in general. But here the general rules of pleading are rebuked, and in this nar the plaintiff has not described any mode of damage, while the object is to recover for an injury or damage to goods. The general rule is that the goods injured or damaged must be stated. This rule applies as well to contracts as to torts, and the rule is stronger with reference to contracts. For then it is an act of commission in which the wrong-doer is aware of his misconduct.

In all torts direct or consequential, particularity is neces-

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sary in the description of goods injured, and in a general way the kind of goods must be described. 1 *Chitty Plea*. 410, 411. *The People vs. Dunlop*, 13 *John*. 440. 1 *Lord Ray*, 1007. *Ib.* 1410. In all cases of contract and in actions for direct or consequential injuries to goods, the rule of pleading is the same. 2 *Chit. Plea*. 333, 356, 342, 669, (g.) *Step. Plea*. 340. 1 *Saun. P. and E.* 400. *Franklin Ins. Co. vs. Jenkins*, 3 *Wend.* 135. All these are cases of *assumpsit*, against carriers, to whom goods have been entrusted. The case of 3 *Wendall* is stronger than the one at bar, for defendants had not possession of the goods at the time of the injury.

The action of *indebetatus assumpsit* is an exception to the rule. There the goods are delivered, the action proceeds on an executed consideration, and is not for the goods which are stated by way of inducement, but for the money. We have nothing to do with the hardship of the rule. If it exists the court will apply it. But there is no hardship in this particularity and there may be as many actions for consequential injuries as there are separate causes thereof.

The cause of damage is not sufficiently alleged or misalleged. Whereby and by reason is not a statement of the cause. Whereby refers to the previous allegation, and by reason of negligence, &c. does no more. To recover for any result from negligence it must be stated, 1 *Saund. P. and E.* 166. In cases of bailment, there is an averment of delivery of goods to bailee, and by reason of improper conduct or negligence in and about the management of the property bailed the damage occurred. But here the breach is an allegation of total non-performance. Under such an allegation a partial breach may be proved, which is not attempted here. The breach of the contract is here relied on as a cause of independent consequential injury.

There is an essential distinction between misfeasance and nonfeasance. So if these defendants without reward agreed to carry the vessel out and then refused to take her, or without reward take her and leave her in the stream; the first case would not be the ground of an action, but the last on

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the ground of a part of execution of the agreement, and then improperly abandoning the residue would furnish a right of action; but for misfeasance there is a different form of declaring from nonfeasance. 2 *Chitty*, 329, 330, 331.

In this case neither non-performance nor misfeasance caused the loss—but the storm, which is not alleged. This is an independent cause for which damages are claimed, though not averred, and here such a loss cannot be proved. When there is a contingent independent cause of loss you must allege and prove it. 1 *Stark.* 366. 3 *Stark.* 1584. Where there is a wrongful act, and a loss thereby arises from an intermediate cause, the intermediate cause must be alleged. *Fitzsimmons vs. Inglis*, 1 *Serg. and Low.* 181, 182. 2 *Chit. Pl.* 682, 656.

The object of this action is to recover damages, and the pleadings are silent as to how it occurred. Whether during the detention, caused by non-performance, the vessel was robbed, or injured by collision, or stranded, seems to have been considered immaterial, and that any species of evidence could be offered.

As against common carriers who have possession, a general form of declaring is allowed, but delay is averred and the carrier is called upon to account for it. If sufficient it serves him as defensive matter. His contract is to carry safely, he takes all perils with certain enumerated exceptions, and must show the cause of loss. This description of causes furnishes no analogy here.

These objections are not obviated by the fourth instruction of the court given to the jury after the evidence was admitted.

The second exception relates to the refusal of the county court to receive *McElderry's* evidence. We insist upon its admissibility. He was not a party to the suit and only incompetent on the ground of interest. *City Bank vs. Bateman*, 7 *Har. and John.* 107. In the matter of *Kep.* 1 *Paige*, 614. *Kemp vs. Baltimore Fire Ins. Co.* 2 *Gill and John.* 108. *Paley on Ev.* 318. The exception to the rule is that interested agents are admissible. It is a conflict between

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general rules. All agents are competent witnesses. All interested persons are incompetent. An agent who has an interest in a verdict and in swelling its amount is competent under the case in 1 *Hen. Black*. The same interest which will not exclude a witness in the case of an individual, will not exclude him when agent of a corporation. Many charters compel the use of interested agents as stockholders. Hence the rule is stronger in favour of a corporation, for they are equally entitled to protection. There is no difference between an interest arising previous to the contract, or made so by the contract itself, and yet it is said that the remote interest of an agent in the possible loss of a contract would disqualify him. One made agent by the command of the law, adopted as agent by both parties is competent. The case in *Har. and Gill*, 408, shows the exception to the general rule, and that it arises from necessity. It is well established with reference to individuals, and I ask its extension to corporations. There is nothing in the fact of its being rebutting evidence; *Jones* adopted *McElderry* as the agent of the company, and it would be iniquitous to exclude the evidence merely because it was rebutting.

The third exception relates to the evidence of *Norris*. In this we suppose *Jones* had knowledge of the intention of the company not to contract to carry out safely—and contracted with a sub-agent—with knowledge that the company had given no such power to their agent and intended to assume no such responsibility. Would it not exclude the authority of a general agent to enter into such a guaranty? The law presumes that a general agent might so contract, but show in fact, that the other contracting party had notice of the limitation of the agent's powers and he could not then recover. This was all one enterprise. We are inquiring into one class of contracts to throw light upon another class of contracts growing out of the same enterprise. It was the same transaction, and not *res inter alias acta*, which answers the case in *Boyle vs. McLaughlin*, 4 *Har. and John*. 291. See 1 *Stark. Ev.* 10, 45, 46. *Jones* was the witness of the plaintiff and

his agent. He had heard of the arrangement, and we propose to prove by *Norris* what the arrangement was. If brought home to *Jones* it must form a material inquiry in the cause. It was material as confirmatory of *Taylor's* evidence. 1 *Stark. Ev.* 527. There are no technical rules about confirmatory evidence, except to exclude suspicious evidence made *post litem motem*.

Under the fourth exception I propose to consider in connection the first and eighteenth directions prayed for by the defendants and refused by the court. These call on the court to announce the extent of *McElderry's* agency, and present two inquiries:—are not the propositions demanded correct—and were they granted in substance, by any of the subsequent directions of the court.

A general agent has no authority beyond the scope of the business confided to him. It is limited by the nature of the employment. *McElderry's* was with reference to passengers. This contract is different in all respects from any other he ever entered into. It was a new contract for employing the company's boats in a new mode. If this can be done we have misapprehended the nature of a general agency, which is a general employment in a particular business. A general authority is not an unqualified one. *White vs. Westport, C. M. Co.* 1 *Pick.* 220. *Paley*, 303.

It is said that corporations can have no general agents. *Angel and Aimes*, 107. Innocent stockholders are to be protected, and powers to agents as respects the corporation are on record either by the charter or by-laws. I do not contend for this rule as corporations may be affected by implied assumpsits. But as far as the agents are limited by its charter, they cannot bind their principals beyond it. *Bank of Columbia vs. Patterson's adm'rs.* 7 *Cranch*, 306. 1 *Cow.* 537. Every authority must be exercised according to law. Every general agent under a charter is presumed to act under its authority and in conformity with it. Upon this principle the eighteenth prayer was framed, and hence the defendants are entitled to a verdict, unless a special authority existed in

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McElderry, or the company adopted his acts. Any other doctrine would place the company at the feet of the agent and oblige them to do what his malice or ingenuity might dictate. 'The proposition is monstrous, "I will not discuss it."'

The tendency of the refusal of the court was to embarrass the jury, and it is material to ascertain whether in substance it is covered by any of the instructions given below. In the fifth instruction, the court did not put the plaintiff's right to recover upon the adoption of the company of *McElderry's* contract. It informs the jury what an adoption is, but does not treat of its consequences. The cause went to the jury upon the question of general agency alone, and not upon the adoption of the contract.

The sixth point in the opening statement :

Does a contract by a company out of the limits of its charter, stop the company from denying it, preclude them from contesting it, whether made under a general agency, by special authority, or adopted by the company after it is made?

The company was chartered for the conveyance of passengers and transportation of merchandise and other articles. The prayer takes the language of the charter, and concludes that if the contract was out of the charter and has no relation to it, that the plaintiff is not entitled to recover. The plaintiff contended, if the contract was out of the charter, still he could recover. The rule is of importance and big with the fate of nations. The *old* rule was, that a specification was not an *exclusion* of powers not specified.

The case in 5 *Serg. and Low.* 218, was a suit against a corporation, where they had received value and set up a want of power against equity.

The settled rule of *American* law is, that every corporation is limited as to its powers, by the objects to be accomplished—the sphere of action designated—and that a specification of the means of accomplishing its purposes, is an exclusion of all other means. 2 *Kent Com.* 239, 240. *North River Ins. Co. vs. Lawrence*, 3 *Wend.* 482. *Angel and Aimes*, 59, 60, 145. *New York Firemen's Ins. Co. vs. Ely*, 2 *Cowen*, 699.

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5 Conn. 562; and the rule is illustrated by a variety of examples mentioned in the cases cited. It is owing to judicial foresight adopting these rules, that we now enjoy the benefits flowing from the use of corporate powers. What sort of propriety is there in the application of the doctrine of estoppel to such a case? The other view is protection of public rights, and keeps corporations within their restricted spheres, and why should the court close its ears to it. A corporation is a legal entity; out of its charter it has no existence. An objection derived from a want of power, is of a legal disability. Was there ever an estoppel against a legal disability? Infancy, usury and gambling are never closed by estoppel. The idea is, that both plaintiff and defendant must close their eyes, bind the courts and conclude the law. There is no estoppel against a statute. 2 D. and E. 171. This is a highly instructive case, in which a corporation sued to disaffirm its own acts and recovered. It is as easy to estop a corporation as to its existence as to its powers, and then what becomes of the principle, that a corporation must act within its charter? Estoppels are reciprocal; yet it is fully settled that *Dandridge* as defendant could have shown, that this company could not have entered into this contract, and so turned the company out of court. Then answer the case from 16 Mass. The reciprocity of the estoppel relied on fails. *Clark vs. Mayor, &c. of Washington*, 12 Wheat. 40. *Welland Canal Co. vs. Hathaway*, 8 Wend. 484. There is no analogy between the doctrine and the proceeding for a forfeiture of the charter. The company is kept by it within its limits—restrained to its charter, but its existence is not forfeited. The proposition intended to be submitted to the jury was, whether the contract had any relation to the business of the company—the jury could not have hesitated. It is limited both by the termination and its objects. It was not established to break ice and become towers of vessels. The distinction is manifest between the charter and that of the Steam Towing Company.

The seventh point of the statement is open here under the

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court's fifth direction to the jury. It is a question of adoption of the contract by the defendant. The instruction is that mere payment over of the money received by the agent from plaintiff—its receipt and intention under all the circumstances is an adoption of the contract without reference to the knowledge of the principal. Since this is the broad view of the court, I have a right to test it by a reference to any statement of facts, showing the ignorance of the principal. *Beall, et al vs. Cunningham*, 3 Peters, 69. *Owings vs. Hull*, 9 Peters, 629. *Penn and another vs. Harrison, et al*, 3 Term. R. 757.

Upon the motion in arrest of judgment two questions arise :—

1. As to the insufficient description of the goods damaged.
2. As to the want of averment of a sufficient consideration to sustain the contract.

I leave the first question on the argument of my colleague. Upon the second question. In the action of *assumpsit* the agreement and its elements are essential and traversable. The plea of *non assumpsit* puts in issue every thing of the essence of the declaration. Every thing of the essence of the undertaking should be averred. Consideration is of the essence of *assumpsit*, and if none is shown, it is a fatal defect in every stage of the cause. *Gould on Plea*. 503, sec. 22. 1 *Chitty*, 328. There are two classes of contracts—bi-lateral, or uni-lateral, and founded either on an executed or executory consideration—a promise on each side or a promise on one side and assent on the other. It depends on the nature of the agreement, how the pleadings are framed. In cases of promise for promise each promise is necessary to be stated, for each is of equal import in sustaining the action. The reason for averring one applies to the other.

When the agreement is uni-lateral, the act to be done is as essential to be stated, is as material, as the promise in the other case. It is the condition precedent. The promise in one and the act done by the other are material to the action.

In all motions in arrest, the evidence is out of consideration, and the case is to be considered as if the exceptions

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were not in the record. *Addington vs. Allen*, 11 *Wend.* 384. Then this nar is either for a promise founded on a promise, or a promise founded on an act.

As a promise in consideration of a promise. How is the promise of the plaintiff set forth? It is no more than a promise by the defendant with the reasons for it—a mere statement of a conditional promise on the part of the plaintiff. In cases of promise for promise, both are essential. They are facts of the same character—tend to the same end. Each is essential to show the obligation of the other. *Chandler vs. Rossiter*, 10 *Wend.* 491. 1 *Chitty*, 329. The court will not infer an *assumpsit* after verdict—and certainly not except where the agreement on both sides is stated. 1 *Chitty Plea.* 321. The case of mutual promises to marry illustrates the rule. 2 *Chitty*, 321. A nude pact is not aided by proof. Under this nar the plaintiff need only prove the agreement of the defendant.

In truth, however, this is not a case of promise for promise. It is a uni-lateral promise, where the promise of the defendant is founded upon an act to be done by the plaintiff, and the act to be done is not stated. Then it is the doing of the act which constitutes the consideration. Conditions precedent must be averred. 1 *Chit.* 351. This is a case without a cause of action set forth, which is fatal before or after verdict. 1 *Saun.* 158. *Gould*, 504. The contract stated is to take the vessel and carry her in safety through the ice, for which the defendant is to be paid *a priori*. This is a contract of insurance. If the sum is not to be paid until the work is done, why is it in consideration of it, the defendant was to insure the vessel through the ice? It is in the nature of premium, and the work was not to be done until money paid. If the consideration is executory you must show that the party would have had the full benefit of his agreement, and therefore aver the promise *before* to do the act subsequent. There is no middle class. The cases are promise for promise, or promises in consideration of an act to be done. This motion is entitled to favour. It is not a case of sleeping

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and laying by. This nar was assailed from the first moment of trial.

With regard to a statement of mutual promises you must show, not only their existence, but their binding character on both parties. 1 *Chitty Plea*. 323.

The ninth point is raised by the eleventh, thirteenth, and fifteenth prayers.

These prayers concede that the agreement may have been as proved by *Jones*, and the right to legal or ordinary damages, but the sole question here is as the consequent injury, loss of goods—and this involves—

1st. The plaintiff's power to save himself by his own exertions.

2d. His obligation to save himself through the defendants' exertions.

The thirteenth prayer proposes the second proposition above stated for consideration. The means of escape offered to the plaintiff and refused.

The principles were admitted by the court, but their application was refused.

Under these circumstances if the defendants' prayers had not been made, we might have had the benefit of those principles upon the court's instructions. But the court's directions to the jury taken in connection with the rejected prayers deprives us of that benefit. The court excluded our specific propositions, and hence in the consideration of the general instructions, though these cover the specific propositions, yet as the specific prayers were rejected, so the effect of the special means of escape from liability was not urged before the jury.

The general directions only relate to obligations to save them by their own exertions. The error of the court was in supposing that the crew of the *Hunter* could only exert themselves in one direction, the downward track, and not applying the rule to their obligation to come back, which is important upon the question of consequential damages. They were lying on a freezing night of an almost Russian winter, the captain

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and crew alarmed—some of them flying off under the apprehension of danger—the cargo in peril, and the plaintiff refuses the offer to come back with the vessel and the lost goods.

And lastly, there is a variance between the contract as alleged and proved. That alleged was against all risks, that proved was alone against danger from ice.

DORSEY, Judge, delivered the opinion of the court.

The object of all pleadings is that the parties litigant may be mutually apprised of the matters in controversy between them. The declaration should substantially present the facts necessary to constitute the plaintiff's right of action, that the defendant being thereby forewarned of the nature of the proof to be preferred against him, may, if necessary, be prepared to contradict, explain or avoid it. The motion in arrest of judgment presents the question, as to the sufficiency of the *nar* filed in this case. After stating the "loading of certain goods, chattels, wares, and merchandise," on board the schooner *Hunter*, without further specification thereof, it alleges, that the defendants undertook and faithfully promised the said plaintiff, that they, the said defendants, for and in consideration of the sum of thirty-three dollars and thirty-three cents, to be paid by the said plaintiff to the said defendants, would safely and securely take the said schooner or vessel so loaded as aforesaid, with the goods and chattels of the said plaintiff, from and out of the ice, and from and out of the harbour and port of Baltimore aforesaid, to and at such point, or place of safety, in the said river or bay, below where the same was frozen, and below where the navigation thereof was obstructed by ice as aforesaid, by breaking the said ice, and towing the said schooner or vessel to such point or place of safety as aforesaid. Yet the said defendants, not regarding their said promise and undertaking, and not regarding their duty in this behalf, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, neglected and refused so to do, although thereto requested by the said plaintiff, whereby and by reason of the negligence and improper

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conduct of the said defendants, and their agents, the said schooner or vessel was injured, stranded, and lost; and the aforesaid goods and chattels, wares and merchandise of the said plaintiff, became and were greatly broken, damaged and destroyed, and wholly lost to the said plaintiff.

The first reason assigned for arresting the judgment is, because the plaintiff's declaration does not show, or allege, any consideration for the defendants' undertaking and promise therein declared upon. This objection we think well founded, and is fatal to the plaintiff's right of recovery in the present state of his pleadings. The declaration sets out the promise and undertaking made by the defendants, but it alleges no agreement entered into between the plaintiff and defendants; it states no promise or obligation on the part of the plaintiff to pay the \$33.33. Every allegation in the declaration may be true, and may have been proved on the trial, and yet no evidence has been offered to shew that there ever was any agreement between the parties, or promise by the plaintiff to pay to the defendants the sum they required as the consideration for their services to be rendered. Their promise then was a *nudum factum*, and no action would lie for their refusal to perform.

We do not think the second reason assigned for the reversal of the judgment, can be sustained. The plaintiff was under no obligation to pay until the services were rendered. The performance of their part of the agreement, had such an agreement as is alleged been entered into, is a condition precedent to the right of the defendants to demand the stipulated remuneration.

The opinion of this court upon the third reason assigned, is sufficiently expressed in our views on the two preceding reasons.

The motion in arrest we also think supported by the fourth reason. To enable the defendants to make the requisite preparations to meet the proof against them, in a case like the present, some more certain and definite description should have been given of the cargo, than that of "goods, chattels,

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wares and merchandise." See *Candler & Hart vs. Rossiter*, 10 *Wend.* 487. *Gould's Pl.* 503. *Stephen's Pl.* 348. *Martin vs. Henrickson*, 2 *Ld. Ray*, 1007. *Wiatt vs. Essington*, 2 *Ld. Ray*, 1410.

We next approach the questions raised on the several bills of exceptions taken in the county court, and first as to the admissibility of the testimony *offered* to be adduced as stated in the first bill of exceptions. In our opinion the county court erred in admitting the testimony offered to go to the jury. It was inadmissible under the pleadings in the cause, because the facts, in proof of which it was offered had not been put in issue. The declaration simply charges the promise and undertaking of the defendants, their neglect and refusal to comply therewith, upon the request of the plaintiff, and that thereby the loss was produced. These were the only facts in reference to this exception put in issue by the defendants' plea of *non assumpsit*. To meet proof in support of them, he was bound to come prepared; but not to defend himself against a cause of action resting on facts essentially different from those put in issue. The charge alleged was in substance a total neglect and refusal by the defendants to perform their undertaking, whereby the loss accrued. The evidence offered was by necessary implication to contradict such charge, and to shew that the defendants had not wholly neglected and refused to fulfil their promise, but that they had in part executed their engagement, yet in a manner so negligent, imperfect and improper, that the vessel and cargo were exposed to perils, to which but for such conduct they would not have been subject, and that thereby the loss accrued. Can it be said that in permitting such testimony to go to the jury, the sage and venerable maxim of the common law, "that the *allegata et probata* must correspond," would not have been violated. The materiality and importance of the proof in question upon the verdict of the jury, is manifested by the fact, that with it they gave a verdict for the plaintiff for \$2,347.79; without it their verdict could only have been for nominal damages. It is true the plaintiff has alleged that

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the loss occurred not merely from the neglect and refusal of the defendants to perform their contract, but by reason of the negligence and improper conduct of the said defendants and their agents: but it has not been even suggested in the argument for the appellee, that so general and indefinite a statement, without any specification of the acts of negligence and improper conduct complained of, would license the introduction of the testimony offered. Under the declaration before us, the plaintiff's right of recovery was limited to such damages only as naturally resulted from the defendants' total neglect and refusal to perform their contract; he was not at liberty to inflame them by the evidence alleged to have been *offered* in the first bill of exceptions.

In the argument on the part of the appellants, it has been urged that the contract proved in evidence, varies from that alleged in the declaration, and therefore was inadmissible before the jury. Two variances have been suggested: the first is, that the *nar* states to tow out the vessel and cargo safely and securely, which would cover losses from any and every cause, and the proof is of a contract to tow out the vessel and cargo, "free of damage of ice." This objection would be well founded if the defendants were in a condition to avail themselves of it in this court. The second variance is that the declaration states the consideration to be paid for towing out, to be \$33.33, and the proof states it to be \$33.33 $\frac{1}{4}$. The variance alleged is one-third part of a cent. If this question were properly before us, we should hesitate long before we would declare that a difference between the *allegata* and *probata* of one-third of a cent, to represent which we have no coin, currency, or means of payment, was a fatal variance. But neither of these questions of variance are presented for our determination. The proof of the contract never was objected to in the county court, and surely since our act of assembly of 1825, such a question of variance cannot be raised in this court. The testimony to which objection was taken in the first bill of exceptions, was not that which proved the contract, but that which was "*offered*"

to prove its imperfect execution, and the consequences ensuing. As authorities sustaining some of the views of this court on the points raised on the first bill of exceptions, see *Archbl. Civ. Pl.* 170. *Doans vs. Badger*, 12 *Mass.* 69. 2 *Stark. Ev.* 815. 1 *Stark. Ev.* 366. 2 *Chit. Pl.* 329 to 331. *Fitzsimmons vs. Ingles*, 5 *Taunt.* 534.

We concur with the county court in their rejection of *McElderry* as a witness for the purpose for which he was offered. Although it has been in many cases determined that an agent is from necessity a competent witness to prove the terms of a contract made by him, even though in his character of agent he may gain or lose by the event of the suit, yet we have met with no case in which it has been held that a person having a direct interest in the event of the suit, independently of his acts as agent, can by being employed as agent, be rendered a competent witness to prove even the acts of his own agency. If the principle contended for in this case were sanctioned, it could scarcely be called an extension of the doctrine to say, that a co-partner selling for his firm, was a competent witness to prove the sale and the terms thereof, or that the like facts might be proved by an owner himself who disposed of his own property without the intervention of an agent. To this length we do not feel inclined to extend this principle of necessity, but rather concur with a learned commentator on the law of evidence, who in treating on this subject says, it is to be remarked that the law has been justly jealous of any extension of this rule, and that its operation, in consequence, has been very limited in practice. 2 *Stark. Ev.* 753.

The only question presented by the third bill of exceptions, is as to the admissibility of the testimony of *Norris*. It is correctly stated in 1 *Stark. Ev.* 46, that all the surrounding facts of a transaction, or as they are generally called, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption or inference as to the question in dispute. The matter here in dispute in relation to which this evidence was

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offered, was, what were the terms of the contract between the plaintiff and defendants below, for the towing of the *Hunter* and her cargo out of the ice by the steamboats of the defendants. It was no part of the usual employment of their steamboats, or of the business of the defendants, but was an isolated enterprise in which they had consented to engage, not with a view to profit, but to accommodate the owners of vessels confined in the port of *Baltimore* by the ice, and they demanded nothing more for their services than reimbursement for the probable cost of the enterprise. That the amount paid by each owner was in proportion to the tonnage of his vessel, and that it was the distinct understanding of the witness, at whose instance this enterprise was entered into by the defendants, at the time it was entered into, that they were to be at no risk, and were not to be paid any thing if they did not succeed in the enterprise. That the defendants expressed much reluctance to accede to this arrangement, and finally agreed to it on condition that a number of vessels offered to be towed sufficient to bear the cost of the enterprise; that a sufficient number was accordingly procured. In determining on the admissibility of the testimony offered, it must be conceded, that all these facts and circumstances would have been established by the witness to the satisfaction of the jury. It must also be conceded as a fact recognized by the common sense of every man, that a vessel with a cargo on board requires a greater power to tow her out than one of the same tonnage without cargo. The verity of *Captain Taylor's* evidence must also be conceded. Assuming then, the truth of the facts and existence of the circumstances enumerated, let us test their admissibility by the rule of evidence laid down by *Starkie*. Do they afford any fair presumption or inference as to the question in dispute? In our opinion they do. The testimony of *Captain Taylor* is sufficient to warrant the jury, if they saw fit to do so, in finding that *Jones* knew before he entered into any contract for the towing out of the plaintiff's vessels, what the terms of the arrangement were. Without such knowledge is it to be pre-

sumed, that without making the slightest inquiry as to the terms, he would have directed the president of the company to “set him, *Jones*, down for two vessels?” Or if the jury should not find such antecedent knowledge in *Jones*, the proof of *Captain Taylor* was sufficient to justify the jury in finding a perfect willingness to assent to his vessels being towed out upon the same terms which by the arrangement were imposed on all other owners. *Taylor* also proves that *Meeteer*, after he had been directed by *Jones* to set down his two vessels, told him, “that the company would not be at any risk nor responsible for the property.” With this communication, *Jones* does not appear to have expressed either surprise or dissatisfaction, nor does he countermand his order to set him down for two vessels. Standing alone, might not the inferences deducible from *Taylor’s* testimony, be legitimately urged on the jury, as if not wholly irreconcilable with *Jones’* proof of his contract with *McElderry*, at least as casting on it a shade of suspicion as to its accuracy? Is it probable that *Jones* would have exacted such terms? Was it an act of fair dealing in *Jones*, after acceding to the terms upon which alone the defendants assented to act, to procure from their agent a contract which they never authorized, and which was a wanton sacrifice of their interests? Was it probable that their agent ever entered into such a contract? Connecting these probabilities as to the accuracy of *Jones* in relation to the contract, with the testimony of *Norris*, that the defendants were to be at no risk—that each vessel paid in proportion to tonnage, and consequently that nothing was paid to the defendants for towing out the *Hunter’s* cargo, nothing for the alleged insurance of either vessel or cargo, can it be contended, that all the facts and circumstances adverted to, when weighed in connection, were not proper to be submitted to the jury to find if they saw fit to do so, that *Jones* had mistaken or mis-stated the terms of the contract on which the plaintiff had rested his right of recovery?

But there is another aspect of this question, in which we think the testimony of *Norris* ought to have been received.

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Jones had sworn that he had made one contract with *McEl-derry*. *Taylor* had sworn that the contract was made with *Meeteer*, and it was the province of the jury, not of the court, under all the facts and circumstances surrounding the matter in controversy (of which those detailed by *Norris* were a very material part,) to determine between whom the contract was made and what were its terms. To enable them to do this, the testimony of *Norris* was not only admissible but indispensable. We therefore think the county court erred in rejecting it. The case referred to by the appellee's counsel, of *Boyle, et al vs. McLaughlin*, has no bearing upon the question now before us. The court's rejection there of the clerk's testimony, in the fourth bill of exceptions is unquestionably correct, as had he proved that the habitual communications of *Boyle*, which he detailed, had been made to *McLaughlin* himself at the time of their contract, they could not have been received in evidence, being offered to alter and change the written contract between the parties.

We think the county court erred in refusing the appellants' first prayer in the fourth bill of exceptions; the instruction which was asked from the court to the jury being the natural inference both of law and fact, not only to the extent of the prayer, but perhaps further might their instruction have been extended. In the law of *Prin. and Agent*, 259, it is stated, that by a general agent is understood not merely a person substituted for another for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and to sell certain kind of wares, to negotiate certain contracts and the like.

The second direction also at the instance of the defendants ought to have been granted by the court below. In *Angel and Aimes on Corp.* 139, it is justly observed, that a corporation and an individual stand upon very different footing. The latter existing for the general good of society may do all acts and make all contracts which are not in the eye of the law, inconsistent with the great purpose of his creation; whereas, the former having been created for a specific pur-

pose, cannot only make no contract forbidden by its charter, which is as it were the law of its nature, but in general, can make no contract which is not necessary either directly or incidentally to enable it to answer that purpose.

In deciding therefore whether a corporation can make a particular contract, we are to consider in the *first* place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the *second* place, whether a power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfil the purpose of its existence; or whether the contract is entirely foreign to that purpose. In page sixty of the same book it is stated, “that a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted, “and that a corporation is confined to the sphere of action limited by the terms and intention of the charter.”

According to these wise and now well established principles the appellants had no power to bind themselves by such a contract as that attempted to be enforced against them, and possessing none themselves they could not delegate it to *McElderry*, their agent. At the instance of the defendants then the court should have granted the direction prayed for. The instruction should have been given if required without the qualification attached to it; but it is no ground for refusing the prayer of a party because he asks less than he is entitled to at the hand of the court.

It has been urged that the defendants having entered into this contract are estopped from denying their competency to have done so. To the doctrine of estoppel applied to such cases we cannot yield our assent. If the corporation is estopped from denying its power, the estoppel operates with like effect upon those who contract with them, and the result would be that no matter how limited the design and powers of a corporation may appear in its charter, practically it is a

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corporation without limitation as to its powers. Such a doctrine at this day is dangerous to the interest of the community, and is at war with the modern decisions upon the subject. We therefore think the county court erred in refusing the second direction prayed for by the defendants. 5 *Cowen, Rep.* 560. *New York Fire Ins. Co. vs. Ely*, 15 *John.* 383. *The People vs. Utica Ins. Co.* 3 *Wend.* 482. *The North River Ins. Co. vs. Lawrence*, 4 *Kent Com.* 240. *New York Fire Ins. Co. vs. Ely and Parsons*, 2 *Cowen*, 678. *Broughton vs. Salford Water Works*, 1 *Eng. Com. L. R.* 215.

We think the court erred also in refusing to give the defendants' third and fourth directions for the reasons assigned by us in the consideration of the first bill of exceptions.

We think the court erred too in denying to the defendants their *seventh* direction. Could they have lawfully assumed the obligations imposed on them by such a contract as under this direction it was left to the jury to find, they were not answerable to the same extent that common carriers would have been. They were only bound to use reasonable efforts, care and diligence in the execution of their undertaking. *Caton vs. Rumney*, 13 *Wend.* 387.

We concur with the county court in refusing to give the eighth direction contained in the fourth bill of exceptions. As far as that direction is concerned the defendants admit the legal validity of their contract, but require the court to instruct the jury that if they believe the facts therein enumerated, that then the plaintiff is not entitled to recover. These facts do not *per se* justify such a verdict as the court were called upon to direct them to give. Such an instruction could not have been given to the jury without withdrawing from them the determination of other facts, indispensable to such a finding as they were called on to make. Before such a direction could be given the court must have assumed as facts so conclusively proved as not to be left open for the consideration of the jury, that the defendants had used all reasonable efforts, care and diligence to tow the *Hunter* and her cargo through the ice. The proof in the cause by no

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means warranted such an assumption on the part of the court, and it rightfully therefore refused to withdraw from the jury the determination of those disputed facts, on which it was their exclusive privilege and duty to decide.

For the same reasons the court were right in refusing to grant the plaintiff's *eleventh* direction.

The court below were right in refusing the *thirteenth* direction. It assumes without assigning any reason therefor, that it was not the duty of the defendants' steamboats upon their return up the track to tow out the *Hunter* and her cargo which had been left behind by misadventure. In the absence of all adequate excuse for not doing so, if the jury believe the contract as proved by *Jones*, it was the duty of the steamboats on their return to have towed out the *Hunter* and her cargo. This direction is not supported as has been supposed by the case referred to in 13 *Wendall*. Here the voyage, the business of the steamboat, was to tow the vessels safely out of the ice; according to *Jones*' testimony they were bound to use all reasonable efforts within their power to accomplish that end. In the case in *Wendall* the steamboat was bound on a regular trip from port to port. With a knowledge of this fact, the plaintiff, the owner of a small boat, applied to the master of the steamboat to tow his freight boat down to the steamboat's port of destination. The master told him he thought his boat was too heavily laden to be towed down, as the south wind was rising. The plaintiff said he was very anxious to get down, and he must and would go, and accordingly fastened his boat to the steamboat and the vessels proceeded on their voyage. The plaintiff's boat filled with water and sunk, and the court determined that the master of the steamboat was only answerable for reasonable care and diligence, and the court predicate their opinion upon the ground that the master of the steamboat was not the insurer of the plaintiff's boat, and therefore ordinary care and diligence was all that was required of him. But the inference is irresistible, that if there as here, according to the proof of *Jones*, the defendant had been the insurer of

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the plaintiff's vessel, he could not have discharged himself but by the use of extraordinary care and diligence.

The county court erred in refusing to grant the defendants' *fourteenth* direction. If the jury had found the facts submitted to them by the prayer, the agents of the defendants had used all the efforts to perform their contract, which under the circumstances of the case were imposed on them by law, consequently the plaintiff had no cause of action against them.

We think the county court were right in refusing the *fifteenth* direction of the defendants; as to discharge the defendants under it, the jury must be satisfied that the loss was occasioned by the default or misconduct of the agents of plaintiff, and this fact is not committed to the finding of the jury with that distinctness and certainty, with which it ought to have been. It is true the jury were required to find that the commander of the *Hunter* was aware of the danger of his situation. But the magnitude of the danger they were not required to find. Their verdict was to have been the same, whether the danger was such as to render the loss of the vessel in the highest degree probable, and would therefore have been avoided by every commander of ordinary skill and prudence, or whether the danger of loss was so light and trivial, that under the circumstances in which the *Hunter* was placed no commander of ordinary skill and prudence would have suffered her to be towed back to the port of *Baltimore*. The court should have granted the direction prayed; provided, that in addition to the facts submitted to them, the jury also found that such was the perilous situation of the *Hunter*, that no commander thereof of ordinary skill and prudence would have refused to avail himself of the offer of being towed back to the city of *Baltimore*.

The court below erred in rejecting the defendants' *sixteenth* instruction, for the reasons assigned by this court in disposing of the first bill of exceptions.

The county court we think were clearly right in refusing to grant the defendants' *seventeenth* direction upon this ob-

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vious ground if all others were wanting: There was no evidence to have been left to the jury to find the fact, that at the time *Jones* contracted with *McElderry* for the towing out of plaintiff's vessels, he knew the steamboats were under contract to tow other vessels up the track on their return to *Baltimore*.

The county court in our opinion erred in refusing to instruct the jury as required by the defendants' *eighteenth* and *nineteenth* directions, for the reasons we have given in examining the correctness of the county court's refusal of the *second* direction.

We think also that the court below erred in their *fifth* opinion and instruction to the jury, as to what facts it was necessary to find, to shew that the defendants had adopted and ratified the contract alleged to have been made between *Jones* and *McElderry*. The cause of action in this case arose after the 20th December, 1831, and the suit was instituted in less than ten days thereafter; no proof was offered that the defendants ever had any knowledge of the terms of the contract proved by *Jones*, to have been made by him with *McElderry*, or that the agent who collected the money for the towing out of the plaintiff's vessels ever paid the defendants the amount collected by him, or communicated to them the fact that any such money had been collected, or on what account it was collected. The court however instructed the jury, if the consideration for the towing out of the plaintiff's vessels, as agreed on between *Jones* and *McElderry*, was collected by one of the defendants' agents, on their way out of the ice, and paid over to the defendants, who have ever since retained the same, as also all the other money that was received from the other vessels towed out of the ice at the same time, "that then the said facts are in law an adoption of the contract, under which said money was paid by plaintiff, and that said contract is as binding on defendants as if there was clear evidence of a precise authority from defendants to *McElderry*, to enter into said contract on their account. This instruction is erroneous on two grounds.

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First, that the jury were not required to find that the defendants knew on what account the money paid to them was received. *Secondly*, that the defendants knew the terms of the contract on which the money was received. If the jury failed to find either of these facts, and they were not instructed that the finding of either was necessary, they were not at liberty to find, nor is it an inference of the law that the defendants adopted the contract under which the money was paid. See *Bell and others vs. Cunningham, et al*, 3 Peters, 69. We concur with the county court in its opinion on the second bill of exceptions and in the rejection of the *eighth, eleventh, thirteenth, fifteenth, and seventeenth* directions asked by the appellants in their fourth bill of exceptions; but dissenting from its *pro forma* decision on the motion in arrest of judgment, and from its decisions on the *first* and *third* bills of exceptions, and from its refusal to grant the *first, second, third, fourth, seventh, fourteenth, sixteenth, eighteenth, and nineteenth* directions prayed for by the appellants in their *fourth* bill of exceptions, and also dissenting from the *fifth* opinion and instruction given by the county court to the jury, we reverse their judgment.

As the appellee in no aspect of his case is entitled to recover; no *procedendo* will issue.

JUDGMENT REVERSED.

THE UNION BANK OF MARYLAND vs. ANN POULTNEY, adm'x, d. b. n. c. t. a. of THOMAS POULTNEY, and JOHN M. ELLICOTT.—December, 1836.

To warrant a court of Chancery in issuing an injunction, strong *prima facie* evidence of the facts on which the complainant's equity rests must be presented to the court to induce its action.

In such a proceeding, the mere oath of a party, as to the existence of a debt, of which he holds in his possession the written evidence, without producing it, should not be regarded by the chancellor as any proof of such debt.

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Where the existence of a debt depends on a written instrument, of which the complainant is presumed to be in possession, it should be exhibited with the bill or a satisfactory reason assigned for its non-production.

A party holding a prior lien on lands has no right to prevent by injunction a subsequent judgment creditor from enforcing his judgment by execution; as a sale under such execution could not defeat or impair his prior lien; but would leave him at law, and in equity, in the same condition as if such sale had never taken place.

APPEAL from an order of *the court of Chancery*, granting an injunction under the acts of 1835, chs. 346 and 380.

The bill in this cause was filed on the 14th November, 1836, by the appellees, and charged that in the month of May, 1832, a certain co-partnership was formed by *William M. Ellicott* and *Samuel Poultney*, to carry on the business of banking and dealing in money, bullion, exchange, bills, notes, and other evidences of debt, in the *city of Baltimore*, under the style of *Poultney, Ellicott & Co.* That certain persons, to wit: *The Avalon Company*, *Thomas Ellicott*, *Samuel Poultney*, *Philip Poultney*, and trustees of *Samuel Poultney's wife*, in July, 1832, conveyed their real estate to trustees, for the better securing the payment of the debts of the said firm as bankers for the term of five years. Those conveyances were exhibited with said bill; that afterwards the said firm became indebted to the said *John M. Ellicott*, on a certificate of deposit issued by said firm, for money deposited with them, dated on the 4th January, 1834, for the sum of \$25,000; that they likewise became indebted to said *Ann Poultney*, as administratrix aforesaid, on a certificate of deposit for \$56,112 81, issued by said firm for money deposited with them, as bankers aforesaid; that the said firm individually and collectively have made default in the payment of said certificates, and each of them are due with arrears of interest; that said sums constitute a lien on the said property conveyed in trust, and that complainants are entitled to the aid of this court to enforce an execution of the power of sale, delegated in the said conveyances in trust, and to be paid out of the proceeds of said trust estate—and the bill further charges, that the trustees mentioned in said

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conveyances in trust are proceeding to execute the powers reserved to them, and have given the notice to creditors prescribed by said deeds, to exhibit their claims; that the claims of complainants were exhibited, and that a claim due to the *Union Bank of Maryland*, on a certificate of deposit of said firm, No. 1053, dated 4th January, 1834, and payable twelve months after demand, for \$25,000, and various other claims were also exhibited by creditors, who acknowledge the validity of the said trust and the proceedings under it; that the said *Union Bank* has obtained judgment against *Thomas Ellicott*, for the said debt of \$25,000, so charged on the said trust property and estate, and for which they exhibited their claims to said trustees, and have caused a *fi. fa.* to be issued thereon, and levied upon the said trust property. The bill exhibited a short copy of said judgment, and it also charged a similar transaction in relation to the *Avalon Company*, and that *Thomas Ellicott* and the *Avalon Company* were two of the grantors, who as aforesaid from motives of friendship had assigned their property in trust for securing the debts of the said firm; that the *Bank of Maryland* is also preferring a claim against the said trust property, which claim the said firm denies, and that until the same shall be adjusted, it will be impossible to ascertain the extent of the liabilities of the said firm, which are charged upon the said trust estate; and that a sale under the said executions, or either of them, of said trust property, while the amount of the said incumbrances is so entirely uncertain, would not only operate a most manifest injury to the grantors, *Thomas Ellicott* and the *Avalon Company*, but also to the appellees, and other *cestui que trusts*; that the execution levied upon the said trust estate by one of the *cestui que trusts*, is calculated to thwart, and will obstruct, perplex, and delay the prompt and due execution thereof, and impair and diminish the value of the said trust property, by involving the title in doubts and transferring the possession to a purchaser holding adversely; and the complainants further charge, as their belief, that it is the purpose of the *Union Bank* to surround said trust with

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difficulties, and to cloud and render uncertain the value of the same, and to cause the same to be sold under the most disadvantageous circumstances, without regard to the rights of any other party interested in the same, unless prevented and restrained by this court, whose province it is to disembarass trust estates and enable trustees to proceed with their duties. To the end that complainants and all creditors who might come in should obtain relief—prayer for an injunction and subpœna, against the trustees of said estate, the *Union Bank of Maryland* and *Poultney, Ellicott & Co. &c.* This bill was affirmed to before a justice of the peace in *Pennsylvania*, by *John M. Ellicott*, and certified to by a prothonotary there.

The deeds of trust referred to in the bill, and short copies of the judgments, with the assignment by *Poultney, Ellicott & Co.* of their property in trust for the payment of their engagements, as bankers, were exhibited with the bill; upon which on the 14th November, 1836, the chancellor (*Bland*,) ordered an injunction to issue, by which *The Union Bank* was restrained from further proceedings on the judgments aforesaid, which was accordingly issued. After the coming in of the answers (which are not material to the consideration of the question appealed from,) the *Union Bank* prayed an appeal from the granting of the said injunction.

The cause came on to be argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

KENNEDY, for the appellants, contended :

That the chancellor erred in granting the injunction in the proceedings described.

1. Because it was apparent from the statements contained in the bill, that the *Avalon Company* was indebted to the *Union Bank of Maryland* in the sum of \$14,000, for which amount a judgment had been obtained in *Baltimore* county court, and execution of *fieri facias* issued thereon; and that said execution was laid on the property of the said *Avalon Company*, which execution in law, the appellants assert,

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gave them as creditors of the *Avalon Company*, a priority over any debt of *Poultney, Ellicott & Co.* which it was the design of the trust deed of the *Avalon Company* to secure.

2. Because it was also apparent on the statements of the bill, and in the exhibit A, accompanying the same, that the *Avalon Company* being an incorporated manufacturing company, had by deed without valuable consideration, and not in any course of business recognized by its charter, conveyed away to trustees to secure the debts of a banking concern with which it had no lawful connection, all its property, consisting of valuable lands, grounds, houses, hereditaments, and real estate. Which deed or conveyance was altogether void and inoperative, contrary to the privileges and powers conferred by the charter, and therefore wholly null and of no effect, or that such conveyance was at least void, as against any creditors of the said *Avalon Company*. On this point he cited the charter of the company, act of 1822, ch. 199. *Providence Ins. Co. vs. Head*, 2 Cranch. *The Trustees of Dartmouth College vs. Woodward*, 4 Wheat. 518. *Bank of the United States vs. Dandridge*, 12 Wheat. 64. 15 John. 358. 5 Conn. 560. *The Inhabitants of the first Parish vs. Sutton and Cole*, 3 Pick. 232.

3. Because it was also apparent upon the bill, and exhibits therewith, that the said *Thomas Ellicott* was indebted to the *Union Bank of Maryland* on his own account, and that judgments had been rendered against him for such debt, and that he was either unable or unwilling to pay the same, whereby his property became liable for such debt, and was answerable for the same before any debt of *Poultney, Ellicott & Co.* could legally be charged thereon, by virtue of the deed of trust described in said bill; and that so far as regards the creditors of *Thomas Ellicott*, the said deed of trust was fraudulent and void. On this point he cited: *Stat.* 13 *Eliz. Roberts on Frauds*, 12, 22, 27. 2 *Ves. Sr.* 11. 2 *Atk.* 181. *Russel, et al vs. Hammond, et al*, 1 *Atk.* 13. *Methodist Episcopal Church vs. Jacques*, 3 *J. C. R.* 92. *Walker, et al vs. Burrows*, 1 *Atk.* 94.

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4. Because the said bill does not show or set forth at what date the certificate of deposit alleged to be held by *Ann Poultney*, as administratrix of *Thomas Poultney*, was issued by *Poultney, Ellicott & Co.* nor when the same was due and payable, nor does it set forth when the certificate alleged to be held by *John M. Ellicott*, was payable, nor does the said bill show at what date the said certificates were refused to be paid. Wherefore the appellants contend, that there being no statement or proof before the chancellor to show that their alleged debts were due before the accruing of the debts of the *Avalon Company*, and of the said *Thomas Ellicott* to the *Union Bank of Maryland*, the chancellor was in error to grant the injunction against either of the said executions, inasmuch as that, the said *Union Bank of Maryland* had at least a priority for their claims against the said parties if such claims existed *previously* to the indebtedness alleged to arise on the said certificates, notwithstanding the deeds of trust. The said deeds of trust being void, as against creditors having claims against the said parties grantors of *elder date* than debts intended to be charged on the trust.

The counsel here went into the consideration of the effect of the *answers* filed in this cause, but as the court decided that the appeal was merely from the *granting* of the injunction and independent of the answers, it is not considered necessary by the reporters to insert the argument of either counsel on that view of the cause.

R. JOHNSON, also for the appellants.

That independent of the acts of 1835, chs. 346 and 380, the appellants in this cause had no right of appeal. The object of those acts was to give to defendants in equity all the rights which the act of 1832, gave to complainants. That act was co-extensive with every grievance of the complainant arising from a refusal to grant or continue an injunction, and the object of the latter laws was to give defendant an appeal to remedy the grievance of awarding or refusing to dissolve an injunction. As the answer is in here,

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and as the filing it is one of the conditions of the right of appeal, we call on the court to examine it. The appeal brings up both bill and answer, and the court is to pass such order in the premises as to it shall seem proper. What premises? Those before you, bill and answer. But I propose to examine this cause on the case made by the bill, and

1st. As to the *Avalon Company* :

The charter is before the court, it is recited in the deed and the bill refers you to that. Had the company, as against its own creditor, a right to execute such a deed? The bill admits that the bank under a *fi. fa.* is about to sell the property of the company on an unimpeached judgment exhibited in the cause, and the court is bound to assume that the debt contracted was a debt incurred in the prosecution of the objects of the charter. In point of fact as the answer shows, it originated before July, 1832. It was a renewed accommodation until sued on at law. Looking only to the bill the debt was contracted for the company and with the *Union Bank*, in ignorance of the deeds of 1832.

The controversy is between a creditor of a chartered company, for a debt contracted in the execution of the charter; and a creditor of a private bank claiming a lien on the property of the corporation, as against such creditor. No company can enter into a valid contract to the injury of a *third* person beyond the sphere of its charter. The effect of such a contract on the company itself is a different question. Is it competent for a chartered company by a contract out of the sphere of its charter, to dispose of its funds to the injury of those contracting with it and within its chartered powers? The *Avalon Company* could not have become such a bank as was the firm of *Poultney, Ellicott & Co.* She could derive no benefit from her deed, it was only to take effect upon the default of *Poultney, Ellicott & Co.* and I concede that if she could in anticipation, have transferred her property without consideration to pay the debts of *P. E. & Co.* she may apply the same means in the same way after those debts are due. To all charters there are three parties. The state,

the corporators, that portion of the community who contract on the faith of the charter and are entitled to its faithful execution—and in that view the *Union Bank* has the same rights as if named in the charter, and the company's funds specifically pledged to her for her debt. In inquiries into validity of acts done under a charter we examine the grants of power conferred by it. The statute is the enabling power. Every act which the charter does not authorize the corporation to perform, is as much a nullity as if no corporation existed. It is true as a general rule, that for mere violations of chartered franchises, there is no forfeiture unless on office found, yet any individual for wrong done him in that way is entitled to the whole power of the government to recover his right.

A corporation can prefer creditors—if so, and the creditors of *P. E. & Co.* be creditors of that description, and the deed of 1832 a guarantee to them, then it results that a company may defeat all inquiries into the limitations of its powers—that is the equity of this bill. It denies all right to the *Union Bank*, and takes away the whole funds of the corporation for an object entirely different from the purposes of its creation. Such a deed may operate on the stockholders of a company but not on its creditors, and the parties I know were so advised originally of such results. The company are trustees for creditors, and if no assets the creditors are remediless.

I contend further that this injunction should not have issued until bond had been filed by the complainants—that it is the duty of equity to require bonds in all cases when it foresees that without a bond the party enjoined may be without remedy. Here is a large debt due on judgment from a chartered company, and after execution issued a third party claims to restrain the creditor—after years of delay and litigation the creditor may find the corporation without a dollar. The defendant in the judgment is required to give a bond, why not a stranger who claims to occupy its place. To enjoin a judgment a bond is necessary.

No counsel appeared for the appellees.

Union Bank of Maryland vs. Ann Poultney and J. M. Ellicott.—1836.

DORSEY, Judge, delivered the opinion of the court.

This case comes before us on an appeal from an order of the court of Chancery, granting an injunction to stay the sale of an equitable estate in lands, levied upon under certain writs of *feri facias*, issued out of the county court. Have the appellees, the complainants, by their bill, shewn themselves entitled to the high and extraordinary power of a court of equity, which has been exerted in their behalf, is the question brought up for revision in this court? We are of opinion that they have not. There is no such evidence of their alleged claims as ought to have been produced to satisfy the conscience of a court of Chancery of their existence. Although they have stated with precision, the number, date, amount, and time of payment of a certificate of *Poultney, Ellicott & Co.* held by the appellant, *the Union Bank of Maryland*, yet, when describing their own certificates, of which it is to be presumed they had superior means of knowledge, as to *Ann Poultney's* certificate, they give neither number, date, nor time of payment, and as to *John M. Ellicott's*, the date is given, but without the number or time of payment. Such omissions of themselves had a tendency to awaken suspicions as to the correctness of these claims. To warrant a court of Chancery in issuing an injunction, strong *prima facie* evidence of the facts on which the complainants' equity rests, must be presented to the court, to induce its action. In such a proceeding, the mere oath of the party as to the existence of a debt, of which he holds in his possession the written evidence, and makes no exhibition thereof, should not be regarded by the chancellor as any proof of the debt. Where the existence of the debt depends on a written instrument, whereof the complainant is presumed to be possessed, it should be exhibited with the bill, or a satisfactory reason assigned for its non-production. Upon this ground therefore, if all others were wanting, we think the order of the chancellor appealed from ought to be reversed. But there is another ground which strikes more directly at the root of this order, and would be fatal to it, no matter what exhibits had authen-

ticated the claims of the appellees. They, according to their own shewing, claim as creditors having a priority of lien on lands conveyed to trustees for their security; and that the executions which they sought by injunction to arrest, issued on judgments subordinate to their prior liens, and operating at most, if their rights be established, only on the equitable estate remaining in the grantors to their trustees, and which grantors were the defendants in the suits in which the executions in question were issued. A sale under such executions, therefore, could by no possibility defeat, or impair the prior liens of the appellees, but left them both at law and in equity, in the same condition, as if no such sale had ever taken place. There was then, no foundation for issuing an injunction at the instance of the appellees for the protection of their rights. If such a proceeding were sanctioned in this case, it would follow, that in no case where the mortgagee or person entitled to the prior lien, saw fit to oppose it in equity, could an equitable real estate be sold under a *fi. fa.* in the teeth of the act of assembly of 1810, *ch.* 160, expressly authorizing such sale. To concede such a power to the court of Chancery, would in effect authorize it to nullify acts of the legislature almost at pleasure.

Believing that the injunction in this case improvidently issued from the Chancery court, the order appealed from is reversed with costs.

ORDER REVERSED.

WILLIAM MARSHALL vs. T. T. McPHERSON.—Dec. 1836.

Under the provisions of different acts of assembly, some of them passed more than a century ago, and when tobacco passed as currently as money, *assumpsit* will lie in this state, as well for tobacco, (where the contract is for payment in tobacco,) as for current money, and in some such cases, judgments have been rendered for tobacco.

A widow having a right of dower in the lands of her deceased husband, may,

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instead of suing for, or receiving an assignment of her dower, by arrangement with the heir at law, or devisee, suffer him to rent out the lands, with the understanding, that she, in lieu of her dower, is to receive her proportion, or one-third of the annual rent. In which case, if the heir at law, or devisee rents out the lands, and receives the rents, and keeps from the widow her just proportion, she may recover in *assumpsit*. And if she marry again, her husband having an interest in the land, by virtue of his wife's right of dower, may in lieu of an assignment of dower make a like arrangement and recover his just proportion of the rents received to his use, in the life-time of his wife, in an action of *assumpsit*, brought either before or after her death.

Upon the evidence in this case, it was competent for the jury to have found such an arrangement.

APPEAL from *Charles* county court.

On the 28th January, 1833, *William Marshall* commenced an action of *assumpsit* against *Thomas T. McPherson*, and declared for \$500, and 10,000lbs of tobacco, due for the use and occupation of a certain plantation of the plaintiff, &c.; for sundry matters properly chargeable in accounts; for money and tobacco had and received by the defendant for the plaintiff's use, and also upon an *insimul compatasset*, in which the defendant became indebted for money and tobacco. The account filed with the *nar* was for money and tobacco rent, including interest upon the different items. The defendant pleaded *non assumpsit* and limitations, on which issues were joined.

At the trial, the plaintiff gave in evidence, that at the request of the plaintiff, the witness called on the defendant to settle their accounts. The defendant said, he had rented out two parcels of land, in which the plaintiff had an interest; that one parcel, the larger, rented for 2,500lbs. tobacco per year; and the smaller parcel, for twenty-two dollars per year; that he had collected a part of the rents, and a part he had not; that this was in July, 1830, during harvest, that he the defendant said he would come up as soon as he finished his harvest, and settle with the plaintiff. It further appeared, that the plaintiff, in the year 1823 or 1824, intermarried with the widow of a certain *William Benson*, who had a fee simple estate in the lands in question, and that the defendant married

the sister of the said *William Benson*, who was the heir at law to said *William Benson* after the death of his infant child, who died in the year 1824. The plaintiff's claim was for the rents and issues of the lands, for the years from 1825 to 1830, by virtue of his intermarriage with the widow of *Benson*, and for her dower interest, his wife having died in the latter part of the year 1830. It was also proved, after the conversation of the witness with the defendant, that a certain *Thomas M. Garner*, during that period, was the tenant of the larger parcel of land, at 2,500lbs. of tobacco per year, and that he continued to occupy the same land as tenant to the defendant, up to the time of the death of said tenant, which happened in *February*, 1834; and after his death, the defendant sold under distress, the crop of tobacco left by said tenant in the house, and witness purchased the tobacco, and paid over the proceeds to the defendant, it being fifteen dollars; the same witness further proved, that said defendant sold no more property of the tenant, and the tenant left on the premises other property. Such as cattle and other stock.

The defendant prayed the court to instruct the jury, that upon the preceding evidence, the plaintiff was not entitled to recover, upon the ground, that if the plaintiff had any claim in and for the dower interest of his wife, he could not support this action at law, to recover the same. Which instruction and opinion the court (*Key* and *Dorsey*, *A. J.*) gave, and directed the jury to give their verdict for the defendant. The plaintiff excepted, and brought the present appeal, the verdict and judgment being against him.

The cause was argued before *BUCHANAN*, Ch. J. and *DORSEY*, *ARCHER*, and *SPENCE*, Judges.

J. M. CAUSIN, for the appellant, contended :

1. That the direction of the county-court related to a question not embraced by the issues in the cause, and to only one of the counts in the declaration.
2. That the evidence sufficiently disclosed the relation of

tenant and landlord, between the plaintiff and defendant, to support the count for use and occupation. 2 *Saund. Pl. and Ev.* 489.

3. That although an action at law, may not lie for rents and profits accruing to the plaintiff on account of the dower interest of his wife, without an express promise to pay, yet the evidence disclosed a sufficient acknowledgment of indebtedness by the defendant to the plaintiff, to form the basis of an action of *assumpsit*.

4. That the acknowledgment by the defendant, that he had received money, to a share of which the plaintiff was entitled, is sufficient to sustain the count for money had and received, although the plaintiff's right accrued in virtue of the dower interest of his wife, and the plaintiff below ought to have recovered on that count. 2 *Term Rep.* 153. 1 *Chitty Pl.* 305. 2 *Bur. Rep.* 1008, 1010. 2 *Bro. Ch. R.* 620.

ALEXANDER for the appellee contended :

1. That there was no evidence of any claim of the appellant against the appellee, except for a portion of rents and profits, of which his deceased wife was entitled to dower, as the widow of a former owner, under whom the appellee claimed.

2. That as representative of a dowress, this action cannot be maintained by the appellant, for a share of the rents and profits.

3. The action for use and occupation cannot be maintained without proof of actual use and occupation, or express contract. 2 *Saund. Pl. and Ev.* 490. And as in this case there is no contract, or use and occupation proved, the action must fail; there can be no recovery for another reason, which is, that there has been no assignment of dower, without which there can be no recovery. 11 *Law Lib.* 152.

Her title till assignment is for one-third of the whole, and not one-third in severalty which she seeks to recover. There is no case where a widow has sued at law for rents and profits before assignment.

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If the action for use and occupation may be brought, then it would survive against the representative of the defendant.

Damages cannot be recovered after the death of the doweress. *Steiger vs. Hillen*, 5 *Gill and John*. 132.

BUCHANAN, C. J. delivered the opinion of the court.

The counts in the declaration are for money and tobacco, for the use and occupation of a plantation; for money and tobacco, for sundry matters and things properly chargeable in accounts; for money and tobacco had and received, and on an *insimul compatassent*. The pleas are *non assumpsit*, *non assumpsit* within three years, &c. and *actio non accrevit infra tres annos*, &c. And the evidence at the trial was, that at the instance of the plaintiff, the witness called on the defendant during harvest, in the month of July, 1830, to settle their accounts; that the defendant said, he had rented out two parcels of land, in which the plaintiff was interested, one at the yearly rent of 2,500lbs. of tobacco, and the other for thirty dollars a year; that he had collected a part of the rents, and a part he had not collected; and that as soon as he had finished his harvest, he would go up and settle with the plaintiff. That in the year 1823 or 1824, the plaintiff married the widow of a man, who had a fee simple estate in the lands in question, and that the defendant married the sister and heir at law of the man whose widow the plaintiff had married. That the wife of the plaintiff died in the latter end of the year 1830, and that his claim was for the rent and issues of the lands, from 1825 to 1830 inclusive, on account of the dower interest of his wife, and by virtue of his intermarriage. That in the year 1834, the defendant sold under a distress for rent, for the sum of fifteen dollars, a parcel of tobacco, the property of the tenant, who, for the whole period, from 1825 inclusive, had occupied the larger parcel of land at the yearly rent of 2,500lbs. of tobacco, leaving other property of the tenant on the premises unsold, such as cattle and other stock.

The suit was instituted on the 28th of January, 1833, after the death of the plaintiff's wife, and within three years after

the admission and promise by the defendant to settle with the plaintiff as stated in the evidence.

Under these pleadings, and upon this evidence, the bar of the act of limitations being removed, the counsel for the defendant prayed the court to instruct the jury, that the plaintiff was not entitled to recover, upon the ground, that if the plaintiff had any claim in and for the dower interest of his wife, he could not support this action at law to recover the same; which instruction the court gave, and directed the jury to give their verdict for the defendant; and the case has come up by appeal on a bill of exception, taken by the plaintiff to that instruction and direction.

The question presented by this record is, not merely whether an action at law can be sustained by the husband of a deceased wife, for use and occupation, rents and profits, or damages in dower, by virtue of a claim of dower right in the lands of her former husband, where there has been no assignment of dower; but, whether upon the whole case, as made by the pleadings, and evidence in the cause, the court did right in directing the jury to give a verdict for the defendant. It is true, that the declaration has a count for use and occupation, with no proof of any assignment of dower; and that the evidence is not of an actual tenancy, or actual occupation of the lands by the defendant; but that he rented them out to others. It also appears from the statement of the evidence, that the plaintiff's claim to an interest in the lands was on account of his wife's right of dower.

But to place his right to recover upon that count alone, and upon that portion of the evidence, would be to look to one side, or a part of the case.

There is in the declaration a count for tobacco, and money had and received. Under the provisions of different acts of assembly, some of them passed more than a century ago, and when tobacco passed as currently as money. *Assumpsit* will lie in this *state*, as well for tobacco, (where the contract is for payment in tobacco,) as for current money, and in some such cases judgments have been rendered for tobacco. But in

Lyles vs. Lyles, 6 Har. and Johns. 273, upon a count in *assumpsit* for tobacco, the jury found for the plaintiff, and under the instruction of the court, assessed his damages in money, to the amount of the value of the tobacco at the time it should have been delivered, and the judgment entered upon that verdict for the plaintiff was affirmed by this court. Here there is a count in *assumpsit* for money and tobacco had and received. A widow having a right of dower in the lands of her deceased husband, may, instead of suing for, or receiving an assignment of her dower, by arrangement with the heir at law, or devisee, suffer him to rent out the lands, with the understanding, that she in lieu of her dower, is to receive her proportion, or one-third of the annual rent. In which case, if the heir at law, or devisee rents out the lands and receives the rents, and withholds from the widow her just proportion, she may recover in *assumpsit*, and if she marries again, her husband having an interest in the land by virtue of his wife's right of dower, may in lieu of an assignment of dower, make a like arrangement, and recover his just proportion of the rents received to his use, in the life-time of his wife, in an action of *assumpsit*, brought either before or after her death. Whether any such arrangement had been made between the plaintiff and defendant in this case, was a question for the jury, on the evidence, from which it appears, that the defendant admitted he had rented out two parcels of land, in which the plaintiff had an interest, stating the amount of the annual rent in money and tobacco, a part of which he had received, and that he would call and settle with him. It also appears, that the plaintiff's interest in the lands was the dower right of his wife. We do not say that this is sufficient proof of such an arrangement, or understanding between this plaintiff and defendant, but think it was relevant testimony, under the count for money and tobacco had and received, (and not exclusively applicable to the count for use and occupation,) from which the jury should have been suffered to draw any inference that they might have believed it warranted; and that the court erred in directing them to find a verdict for

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the defendant, looking exclusively to the count for use and occupation, and treating the case as a suit by the plaintiff, for rents and profits, or damages in dower in right of his deceased wife ; instead of submitting it to them, as a claim for tobacco and money, received to the use of the plaintiff, under some arrangement with the defendant, on that count in the declaration, upon the proofs of the admission by the defendant, that he had rented out two parcels of land, in which the plaintiff had an interest, and received a part of the rent, and that he would call and settle with him. How far the jury, if not prevented by the instruction of the court, might have felt themselves warranted in inferring an arrangement or understanding between the plaintiff and defendant in relation to renting the lands, entitling the plaintiff to a proportion of the rents received by the defendant, corresponding with his interest in his wife's right of dower, was a question for their decision upon the whole of the testimony ; and should not we think have been taken from them by an unqualified direction to find for the defendant.

The judgment will be reversed with *procedendo*.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOHN GLENN AND JOHN P. KENNEDY vs. FRANCIS M. FOWLER AND OTHERS.—*December*, 1836.

The great purpose and object of a court of equity in assuming jurisdiction to restrain proceedings at law, is to afford a more plain, adequate and complete remedy for the wrong complained of than the party can have at law. Where a statute has made provision for all the circumstances of a particular case, no relief in equity can be afforded, although the provisions of the statute may conflict with the notions of natural equity and justice entertained by a court of equity.

The several acts of assembly erecting the system which exists in *Baltimore* city and county, in relation to insolvent debtors, has in the first instance, invested the commissioners with the sole and exclusive jurisdiction upon the subject of appointing permanent trustees ; and over the exercise of that

power the court of Chancery can exert no control to supervise or reverse their appointment for any pretended error of judgment.

In actions of *replevin*, the proceedings with reference to the possession, are regulated with exact minuteness by the acts of assembly. Upon the return of the writ, the court is commanded to entertain the question of possession, as a preliminary question altogether independent of the title; and to return the property to the defendant, unless it shall appear that his possession was forcibly or fraudulently obtained, or that the possession first being in the plaintiff, was got or obtained by the defendant without proper authority or right derived from the plaintiff. On this preliminary question the whole matter of fraud may be investigated as fully as in a court of Chancery. Courts of equity have sometimes interposed to prohibit proceedings at law, upon the ground that having possessed itself of the general subject, by an application for its aid, to compel a disclosure or for the exercise of some other admitted jurisdiction, it will dispose of the whole matter and thus avoid a multiplicity of suits.

APPEAL from *Chancery*.

On the 22d November, 1836, *Francis M. Fowler*, *Samuel Poultney*, *David U. Brown*, and *Ann Poultney*, administratrix of *Thomas Poultney*, filed their bill in chancery, charging that in the year 1832, *Samuel Poultney* and *William M. Ellicott* entered into a co-partnership in the city of *Baltimore*, as bankers, under the style of *Poultney, Ellicott & Co.* engaged in business and contracted debts still due. That in 1835, said firm constituted said *Fowler*, their attorney, to settle and adjust their business; that he continued to act as such attorney until the 4th September, 1836, when said *Poultney* and *Ellicott* delivered to him a valid deed of assignment and transfer of all and singular the estate of the said firm in trust, to collect and make distribution equally among all the creditors of the said firm, and which deed was made an exhibit with the bill as a part thereof; that said *Fowler* accepted the trust, and is engaged in the due execution thereof; that on the 16th November, 1836, *William M. Ellicott* petitioned for and obtained a personal discharge under the insolvent laws of *Maryland*; that said *Brown* was appointed his provisional trustee, and bonded as such; that afterwards the commissioners of insolvent debtors, on the application of persons representing themselves creditors of *Poultney*,

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Ellicott & Co. but whose alleged claims were not inserted in the schedule of said insolvent, appointed *John Glenn* and *John P. Kennedy*, permanent trustees for the creditors of said *Ellicott*, and that a very large majority of all the creditors whose claims are not disputed and contested, but are admitted by the said schedule, have recommended said *Brown* as permanent trustee, as will appear by the recommendation of said creditors in the schedule and papers of said insolvent herewith filed; that the said *Glenn* and *Kennedy*, as such trustees, have sued out of *Baltimore* county court a writ of *replevin*, returnable on the 2d January, 1837, against said *Poultney*, *Fowler* and *Brown*, to recover the various books of accounts of said firm of *Poultney, Ellicott & Co.* That the said *Ann Poultney*, administratrix, is a creditor of the said firm on their certificate of deposit for \$25,000, and as such is advised she has a right to require that the said *Fowler* shall proceed in the execution of said trust according to the terms of said deed, and that chancery will protect the same; that the execution of the said writ of *replevin* will deprive the said *Fowler* of the possession of the books of said firm, and prevent certainly, until the return day of the writ, his executing the said trust; that the deed to *Fowler* is valid, and that if it could be questioned the said *Samuel Poultney* would then be entitled to the sole possession of said books, &c. Prayer for an injunction to prevent the execution of the *replevin*, and for *subpœna* for said *Glenn* and *Kennedy*, and for general relief.

The deed exhibited with the bill from *Samuel Poultney* and *William M. Ellicott*, was dated the 14th September, 1836, and conveyed to the said *Fowler*, in consideration of the sum of five dollars, "all and singular the property and estate, rights, credits, and effects of the firm of *Poultney, Ellicott & Co.* and all debts due said firm and securities therefor *in trust.*" That the said *Francis M. Fowler* shall and may sell and dispose of, lease and demise, transfer and assign in such manner and upon such terms as he may deem proper and just, all or any part of the estate, property, rights,

credits, or effects hereby conveyed and transferred, and the proceeds arising therefrom or benefits thereof, shall, after deducting all the expenses incident to this trust, and all counsellors' fees and other costs and charges incurred, or which may hereafter be incurred by the said co-partners, or either of them by reason of any suit or controversy pending, or which may be instituted in regard to the transactions of the said co-partnership, apply to the payment and satisfaction of the aforesaid debts of the said firm, and to pay and satisfy all or any of such debts of said *Poultney, Ellicott & Co.* either in the specific property or estate, rights, credits, and effects hereby conveyed or any part thereof, or by sale, exchange, or transfer, or assignment, and after the payment of all the said debts to re-convey to said partners the entire residue, if any there shall be, of said estate. And in case the said estate shall be insufficient to pay and satisfy in full all the said debts as aforesaid, then the said *Fowler*, after ascertaining all the debts which are truly and lawfully owing from the said firm, shall divide the same estate, effects, credits, and property, or the clear proceeds thereof, equally and rateably among the creditors to whom the said debts are so truly and lawfully owing; and moreover the said *Samuel* and *William*, do hereby empower the said *Fowler* to appoint one or more trustees in addition to himself, or independently of himself, he relinquishing his said trust, provided he shall deem it necessary for the more perfect execution of these presents, and provided that the said *Francis M. Fowler* shall not appoint such one or more additional trustees without the consent and approbation of the said *Samuel* and *William*, or the survivor of them previously obtained in writing, and shall appoint such person or persons as shall be nominated and approved by the said *Samuel* and *William*, or the survivor of them."

The recitals of this deed referred to the prior appointment of said *Fowler*, as their agent, to wind up the business of said firm—the dissolution of said firm and the design to distribute its funds rateably among the real creditors thereof.

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The several exhibits referred to in the bill were filed with it.

On the 22d of November, 1836, the chancellor (*Bland*,) ordered the injunction as prayed.

After this the defendants, *Glenn* and *Kennedy*, filed their answer to the bill, and petitioned the chancellor without further notice to dissolve the injunction. This petition the chancellor dismissed, and the defendants took an appeal as well from the granting of the injunction as the dismissal of the petition.

The answers of the defendants not being considered by this court upon the appeal are omitted by the reporters.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, DORSEY, ARCHER, CHAMBERS, and SPENCE, Judges.

KENNEDY, for the appellants, contended :

That the chancellor erred in granting the injunction in this cause.

1. Because from the bill it was apparent that *W. M. Ellicott* and *Samuel Poultney* had become insolvent, and had taken the benefit of the insolvent laws, and that shortly before they had done so they had executed a deed of trust of all their property and effects to *Francis M. Fowler*, as trustee, which deed was in fraud of the insolvent laws, being designed to prevent the creditors of *Poultney* and *Ellicott* from nominating a trustee, as by the said laws they had a right to do.

2. Because the appellants as permanent trustees of the said *Poultney* and *Ellicott* were entitled to the possession of the books and papers of the said insolvents, not only by reason of the said deed above mentioned being fraudulent and void, but also notwithstanding that deed, supposing it to be good; their right to said books and papers being equal and concurrent with the right of any other trustee.

3. Because it did not appear by the bill that the said trustee had given any security for the execution of his trust, and that it was therefore improvident in the chancellor to issue

the injunction without requiring bond which he did not do. He cited : *Dorsey's Am. Law Insol.* 51. *Eckhardt, et al vs. Wilson*, 8 Term Rep. 141. *King (in aid of Braddock vs. Watson,)* Cond. Exch. Rep. 265. 4 Conn. Rep. 146, 155, 162, 172.

McMAHON, on the same side.

This bill concedes us a *prima facie* case. Its equity rests upon a conflict of title. *Fowler* is in by deed. The appellants claim under the insolvent laws. The commissioners of insolvent debtors acted rightfully. *Williamson vs. Carnan*, 1 Gill and John. 185. They had the legal power of appointing trustees, and their judgment cannot be impeached collaterally.

Does the bill entitle chancery to interfere by injunction? Where there is a dispute at law, injunction will only go to prevent irreparable injury, not on the ground of title alone. *Jerome vs. Ross*, 7 J. C. R. 322. Where there is a prompt and adequate remedy at law, chancery will not interfere. Irreparable injury here is not pretended. The sole injury alleged is a temporary one. No detriment to property is alleged. No more than suspicion at law of our title, and no reason shown why the property replevied may not be restored specifically. Where is such a jurisdiction to terminate? What action of replevin can go on if such a bill may arrest it? No case of conflict of title in which injunction will not be granted. The grant of this injunction is against the analogies of the law to stay legal process. It never interferes except to preserve the subject matter of the dispute. But here there is an adequate remedy at law. At the return of the writ the defendant in *replevin* may move for restitution and may have it if entitled.

The parties claim title in several distinct rights.

Ann Poultney, as a general creditor.

Samuel Poultney, as the solvent partner of the house.

D. U. Brown, as the provisional trustee of *Ellicott*, the insolvent.

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Fowler, under the deed to him.

The defendants are permanent trustees under the insolvent law.

That system has several objects—equal distribution—trustees chosen on a recommendation of majority of creditors—this is ancillary to an equitable distribution of assets—power to remove trustees on application of creditors—trustees appointed and removable on motion of creditors—act of 1820, ch. 193.

This trustee, *Fowler*, was not appointed by creditors—is not removable by them—is competent to discharge himself—may convey the estate to another. His office is wholly at war with the insolvent system. This trustee is the agent of the debtors—a fraud may be kept up in perpetuity—he may appoint a successor—that successor guilty of a fraud may appoint another. As to what assignments are good against dissentient creditors. If made, coupled with condition of release for a portion of the debt, it is void. Such deeds are only valid on unconditional surrender of the property. This deed is at war with the policy of the law, and cannot be sustained. The grantor about to become an insolvent debtor, can do nothing inconsistent with that relation without the privity of his creditors. He cannot strip himself of his property, and in a state of nudity leap into the gulf of insolvency.

Every such deed is a fraud on the principles of the common law. Every deed made in contemplation of bankruptcy is a fraud, though for the equal benefit of creditors, as it takes from the creditor the appointment of assignees; and where you find the same elements in any other case the deed is fraudulent and void.

Such a deed validated is a premium to debtors to violate the insolvent law. Does any man doubt between the efficiency of trustees selected by debtors or creditors?

CHAMBERS, Judge, delivered the opinion of the court.

The court have to regret that in this case they have not

had the benefit of an argument on the part of the appellees ; but they have been compelled in obedience to the imperative rules of law to decide the case without such advantage.

They do not find it to be necessary, however, to express an opinion upon several points presented by the appellants' counsel, and it is their purpose to avoid the decision of any matter not immediately demanding their notice.

The great purpose and object of a court of equity, in assuming jurisdiction to restrain proceedings at law, is to afford a more plain, adequate, and complete remedy for the wrong complained of than the party can have at law. 1 *Story Com.* 53.

The rule which confers the chancery jurisdiction in such a case is as well established and as much entitled to observance as the rule which clothes the same tribunal with jurisdiction, in cases of fraud, accident, or of trust, but both are rules of general and not universal application.

One of the excepted cases is, where a statute has made provision for all the circumstances of a particular case ; no relief in equity can be afforded in such case, although the provisions of the statute may conflict with the notions of natural justice and equity entertained by a court of Chancery. 3 *Black Com.* 432. *Fonbl. B.* 1, *ch.* 1 *sec.* 3.

The material grounds assumed in this bill and on which the injunction is asked are, that the appointment of the appellants to be permanent trustees has been irregularly made, on the recommendation of those who ought not to have been regarded by the commissioners of insolvent debtors as creditors ; that the court of law could not order a restitution of the property replevied till their next session ; and that the trust created by the deed to *Fowler*, one of the appellees, would in the interim be obstructed to the prejudice of the *cestui que trusts*.

The several acts of assembly erecting the system which exists in *Baltimore*, in relation to insolvent debtors, has in the first instance invested the commissioners with the sole and exclusive jurisdiction upon the subject of appointing a permanent trustee. Over the exercise of that power the

chancery court can exert no control to supervise or reverse their appointment for any pretended error of judgment. The positive provisions of the statute are imperative. The chancery court can claim no jurisdiction then on that ground.

The proceedings in the action of *replevin*, so far as relates to the possession of the property involved in the suit, are regulated with exact minuteness by the acts of assembly. A bond is required before the plaintiff is permitted to remove the property from the possession of the party holding it. The very object and purpose of the bond is to protect the rightful possessor against all loss or damage he may sustain by reason of the interruption to his possession. 6 *Gill and John*. 453. 3 *Gill and John*. 247. The court at the return of the writ is commanded to entertain the question of possession as a preliminary question, independent entirely of the title, and to return the property to the defendant in *replevin*, unless it shall appear that his possession was forcibly or fraudulently obtained, or that the possession first being in the plaintiff was got or retained by the defendant, without proper authority or right derived from plaintiff. The whole matter of fraud may, on that preliminary inquiry, be investigated as fully as in a court of Chancery, and the relief administered is precisely what is here claimed; that is, by awarding the possession of the property. The sole advantage then, which the applicant to a court of Chancery can expect, is to have that relief afforded him, a few weeks sooner than it would be, in the court of law, to which by the express terms of the statute the investigation and decision of the matter is confided, and where too, full indemnity is secured for any intermediate injury by the *replevin* bond. We do not think that the delay in a case like this is such a defect of ample and complete remedy as the rule contemplates. If it did it would be difficult to say in what case the court of Chancery might not interpose its prompt aid to adjust disputed questions on the ground of defect in the courts of law.

The occasion did not exist in the case, upon which courts of equity have sometimes interposed to prohibit proceedings

at law, on the ground that having possessed itself of the general subject, by an application for its aid, to compel a disclosure, or for the exercise of some other admitted jurisdiction, it will dispose of the whole matter and thus avoid a multiplicity of suits. No disclosure is sought; and so far from being intended to restrain a court of law from exercising jurisdiction over a subject previously depending in chancery, thereby making unnecessary litigation, it proposes by the means of a second suit to be prosecuted in chancery, to arrest the party plaintiff in his then pending suit at law, in which the complainant in chancery could have had the very same relief asked by his bill.

There are doubtless great difficulties in prescribing the precise boundary at which to limit the interposition of a court of equity, to restrain the assertion of doubtful rights, in a manner to produce irreparable injury or to preserve property more effectually, while it is the subject of litigation, or to afford a more perfect and appropriate remedy. Yet we do not doubt that it would be an extension of its jurisdiction, not authorized by principle or authority, to apply it to a case like the present, where the party can have at law a remedy as effectual and complete, as clear and as certain as in a court of equity. *Mit. Ple.* 123.

The order and injunction is therefore reversed with costs.

ORDER REVERSED.

MARSHALL'S LESSEE vs. GREENFIELD.—*December, 1836.*

Any informality in the proceedings of a sheriff upon an execution, are examinable on motion, upon its return.

A judicial sale, made by a sheriff, for the purpose of carrying into effect the judgment of a competent tribunal, is a proceeding which the law regards with favour, and although it will not give effect to an instrument or paper, executed by such officer, if its terms are unmeaning, or so entirely vague as to make it uncertain what was intended; yet every reasonable intend-

Marshall's Lessee vs. Greenfield.—1836.

ment will be made to secure *bona fide* purchasers, and to effectuate the object, which it was the duty, and as the law presumes, the design of the officer to accomplish.

The presumption in such a case is, at least, as proper and strong as in the case of a grantee claiming against a grantor, when the utmost effect is given to the terms of the grant, *ut res magis valeat quam pereat*.

In an action of ejectment by a party claiming under a sheriff's sale, the following description, in the schedule of the property sold, was held to be sufficient :

“To one, of land, called and known by the name of ‘Indian Creek, with Addition,’ containing 217 acres, more or less.”

APPEAL from *St. Mary's* county court.

This was an action of *ejectment*, brought by the lessee of *Hanson* and *Henry Marshall* against *Sarah Greenfield*, for a tract of land called “*Indian Creek with Addition*.” The declaration was filed on the 6th of *July*, 1830, and counted on a demise from the 31st *December*, 1829, for ten years. *Sarah Greenfield* appeared, pleaded not guilty, and took defence on warrant. Issue was joined on this plea. A warrant of re-survey was issued, and plots returned.

At the trial of the cause it appeared, that in an action of debt, instituted on the 18th *July*, 1809, by *Thomas Marshall* and *John Forbes* against *Thomas Greenfield*, the plaintiffs recovered judgment in *St. Mary's* county court, on the 8th of *August*, 1809, with a stay for twelve months; and that the docket and all the original papers and proceedings in the said cause, were burnt in the court-house of the said county. The plaintiff then gave in evidence the following extract of docket entries of *fi. fa.*

<i>Marshall and Forbes</i>	} Extract of record of <i>feri facias</i> .
vs.	
<i>Thomas Greenfield.</i>	
	Levied as per schedule, and sold to
	plaintiffs' agent for - \$500
	JOSEPH GOUGH, Sheriff.

The schedule mentioned in the above return is as follows :

“The schedule of property of *Thomas Greenfield*, taken by a writ of *fi. fa.* to satisfy a debt due *Marshall* and *Forbes*, after being duly summoned and sworn by the sheriff, this 17th *April*, 1812. To one—of land, called and known by the

name of "*Indian Creek with Addition*," containing 217 acres,
more or less, for - - - - - \$2,170

JOSEPH GOUGH, *Sheriff*,

WILLIAM ESTEP, JOSHUA ESTEP.

Test, JOSEPH HARRIS, *Clerk*.

The plaintiff first proved by the said clerk, that it was a true copy, taken of the original entries of the said judgment and papers, in the said judgment of *Forbes and Marshall vs. Thomas Greenfield*, before the burning of the said court-house; and then proved, that the said *John Forbes* departed this life ten or fifteen years past, and that *Thomas Marshall* survived, but died before the institution of the suit in this case, leaving the plaintiffs his only heirs at law; and that the defendant was the wife of the said *Thomas Greenfield*, who died in possession of the lands in controversy, and that the said defendant has continued in the possession of the said lands since the said *Greenfield's* death.

The defendant then prayed the court to instruct the jury, that the levy on the said land, so as aforesaid made by the said *Joseph Gough*, as sheriff, was void for uncertainty, and that the said sale was void; which said instructions the court (*Stephen, Ch. J. and Key, A. J.*) gave to the jury. The plaintiff excepted, and the verdict being for the defendant, the present appeal was prosecuted.

The cause was submitted by the counsel on notes, to BUCHANAN, Ch. J. and ARCHER, DORSEY, CHAMBERS and SPENCE, Judges of this court.

McMAHON, for the appellant:

The plaintiff claims the land in controversy under a sheriff's sale, upon a judgment obtained against *Thomas Greenfield*, the husband of the defendant, at the suit of *Marshall and Forbes*. The proceedings in the action in which this judgment was obtained, down to the *fi. fa.* the schedule of the property seized under it, and the sale of the property levied upon, were all proved by sworn copies, in conformity to the

act of 1831, chap. 175, passed in consequence of the loss of the records by the burning of *St. Mary's* county court-house.

It is unnecessary to say any thing about the admissibility of the proof of the sale, as the record does not present any such question. The proof was received without objection; and the sole question in the case is as to the sufficiency of the description of the property sold. The proof of the sale, and the description of the property sold, are contained in the docket entries of the proceedings on the *fi. fa.* and the schedule of the levy under it.

No objection whatever is made to the sufficiency of the proof of the sale; but conceding the sale to have been made, and to have been *properly* proved, the counsel for the defendant prayed the court to instruct the jury, "that the levy on the said land so as aforesaid made by the said *Joseph Gough*, as sheriff, was void for uncertainty, and that the said sale was void," which instruction the court gave, and the appeal is from that instruction.

Hence the only question before this court is, whether the sale of the land by the description contained in the schedule is void for uncertainty. The uncertainty, if any, arises from the words, "to *one* of land," called, &c.; and from the omission or supposed omission of the substantive to which the word "*one*" refers. In this case, however, there is a full and sufficient description of the property levied upon and sold, even if the words "*one of*," be wholly rejected. The property is described both by its name and the quantity of acres. The description is, of "property called and known by the name of *Indian Creek with Addition*, containing 217 acres, more or less;" and if this stood alone in a deed, or as the description of the property in an action of ejectment, it would clearly be sufficient. The description by its name alone would be sufficient, as it is such as would, in the absence of proof that there was any other piece of land of the same name belonging to the debtor, enable the grantee to identify it, or the sheriff to deliver possession of it; and in the case of there being two tracts of land of same name, belonging to him,

would let in parol proof to show which was intended to be granted.

If then, this description by name and quantity of acres applies to the thing or *property sold*, the description is sufficiently certain, and clearly cannot be vitiated by the previous imperfections. Whether the word omitted, was “tract,” or “parcel,” or “farm,” is wholly immaterial, upon the rule applicable to descriptions of property, in grants or ejectments, “*Utile per inutile non vitiatur.*” And the only mode in which this sufficient description, by name and quantity of acres can be gotten rid of is by the court’s making the intendment, that the word omitted, and which ought to have followed immediately after the word “one,” was one which would have shown that this description did not apply to the thing levied upon and sold; as for instance, by intending that the levy was on one moiety, or one-third part of the land, called, &c. In other words, the court must intend that the levy and sale was only of a part of the property as described by name and acres.

Now what would be the effect of such an intendment? The proof of the sale not resting in parol, the intendment would be of an omission, which rendered the description in the schedule entirely inapplicable to the property actually sold; therefore made the sale void; and it would also be an intendment of the omission of words, which if actually inserted in the schedule according to such intendment, would still leave the same uncertainty, and produce the same result in rendering the sale void. For if the word to follow the word “one” were intended to be a word applying only to a portion of the property, as one moiety, or one-third of the tract, the sale being of a portion of a tract without a particular description of it, it would be void for uncertainty, as this court have determined in many cases. The court would, therefore, be called upon to make an intendment; which would not only defeat the sale in toto, because of the omission, but also that if even the words intended were there, the description would still be uncertain: Therefore, to presume that the sheriff, if

no omission had been made, would have made an insufficient levy and sale, contrary to his duty.

But the contrary rule is well settled, that the court will not only *not* make intendments to defeat grants or sales, but will, on the contrary, make every reasonable intendment in support of them, and to give them some effect; as where property is sufficiently described, but an erroneous location is given to it, or it is erroneously described to be in possession of certain persons, the courts will reject these erroneous descriptions to give effect to the grant. 3 *Bacon's Abr.* 389. *Title Grant*, *H. Ld. Ellenborough's* opinion in 5 *East.* 79, 80. Or, where once certainly described, it shall not be vitiated by the addition of an uncertainty or another certain but erroneous description. *Plowden*, 191; and 8 *East.* 103, adopting the rule there laid down.

But the court find in this schedule a description by name and quantity, and can they intend that this description applies to any thing but the property in fact levied upon and sold? For what other purpose was the description inserted, if not descriptive of the property levied upon? Will the court intend that it was there inserted for the purpose solely of explaining or qualifying another description, which is wholly omitted. For the former purpose, the description is intelligible and useful; but for the latter, it would be wholly useless, for let the court intend what word they may, as following the word "*one*," and denoting merely a part, and not the whole of the property described as one moiety, or one-fourth, &c.; and still there would be no sufficient description. It will be perceived also, that the description of the property sold, is contained in the schedule of the property *as levied upon*; and the question is, not merely whether the court will intend that the *sale* was of part of the land as described, and that the word omitted would have shown this: but also, that contrary to the conduct, usage, and I may almost say, the duty of the sheriff, the *levy* in the first instance, was not on the whole tract, but only on a part of it. Although it is the duty of the sheriff, only to sell so much of the tract as is sufficient to pay

the judgment, yet it is the uniform usage to *levy* on the whole tract, and then to sell out of it what is necessary; and the description here is found in the *levy*.

But if the present was a case for intendment or conjecture as to the word omitted, the description we have in the schedule shows clearly that that description applies to the property levied upon, and that the word omitted applied to the whole property so described, and was in fact, the word "tract," or "parcel," or "farm." This appears clearly by the context. The words in the schedule are, "one, of land, called and known, &c." Insert the word tract, parcel, or farm, or some like word, applying to the whole property afterwards described by name and quantity of acres; and the schedule is intelligible. But insert any word denoting only a part of the property described, as one moiety, or one-fourth, and it would then read, "one moiety of land, called, &c. or one-fourth of land," instead of "one moiety of a tract of land, &c." the ordinary and appropriate manner in which a part would be described. It is evident therefore, that the words "*of land*" in the schedule, were intended to have for their *antecedent* in the place where the omission appears, and in connection with the word "*one*," some word denoting the *entire object or property* to which the subsequent description applies.

In this case however, the appellants do not require any intendment to support their title. They have in the schedule a sufficient description by name and acres, which will be good if the word "*one*" for the want of the substantive which it was intended to govern, be entirely rejected; and they desire only that the description which is good be not destroyed by that which is imperfect, and that intendments be not made to overthrow it, and to render the sale wholly void, which are at war with the language of the schedule, the duty of the sheriff, the uniform usage of making levies, and the benign rules of construction applicable to all grants.

TUCK and J. M. S. CAUSIN, for the appellee.

If the schedule relied upon by the appellant does not sufficiently describe the premises in question, then this court will affirm the judgment.

No fixed rule exists as to the manner of describing the premises in actions of ejectment; but it is generally held that the description must be at least so certain as to enable the sheriff to deliver possession after judgment. *Fenwick vs. Floyd's lessee*, 1 Har. and Gill. 172. Upon this principle it is clear that the plaintiff cannot recover. The writ of possession must recite the recovery in ejectment or according to the verdict and judgment. How then could the sheriff under a writ containing the description set out in the schedule, know what land to put the plaintiff in possession of? If it be left to him to execute the writ at his peril, he may choose to deliver possession of one-fourth, one-half, divided or undivided, or of all the land he may find called "*Indian creek with Addition*," according to his own sense of the proper word to be used to supply the omission of a predecessor in the year 1812, or if he act under an indemnity from the plaintiffs and under their direction, his only guide would be the most enlarged estimate of their own rights. In either case injury might occur to innocent third persons.

The appellants contend that the schedule contains a sufficient description by name and number of acres, if the words "*one of*," for want of their substantive be entirely rejected. If the description were good, but the schedule contained words of addition, as to location or occupancy founded in error, then the court might look only to the certainty, and disregard the other words. But in this case the schedule must be taken altogether. The court cannot reject any part, or the words composing any part as surplusage—because the part supposed to be rejected is of the very essence of the return itself. They are not words of addition or of allegation, rendering uncertain and indefinite that which was *before* sufficiently ascertained. And in the cases referred to by the appellants' counsel, there were previous certain descriptions of the property granted, which would have been entirely

destroyed by the subsequent words. If the principle of those cases be extended to this, then in all cases of inconsistent grants, might courts reject what they pleased, so as to render the deed operative and good as to the whole or part of the property conveyed.

Nothing can be disregarded which may have been in the contemplation of the sheriff in making this return. If he had intended to levy on the whole tract of land, in the manner insisted upon by the appellants, he need only to have omitted the words "*one of*." But he has thought proper to introduce these words. We must, therefore, suppose he had some design in so doing; else we cannot presume in favour of a proper discharge of his duty. It is not necessary that we should ascertain what that design was, unless the return itself indicates it. Here it does not. He may have intended to take one undivided half or other interest in the land, (and such a levy and return would be good,) and the present defendant may have held the other undivided interest. Will this court presume that he intended to take the whole tract, and permit the plaintiffs to recover. When the recovery must also deprive the defendant of land belonging to herself in her own right?

The certainty required goes as well to the interest of the party in the land, as to the quantity and location thereof. And the plaintiffs must shew, not only the particular lands claimed, but the estate which he has in them. Does it appear from the sheriff's return, what legal estate *Thomas Greenfield* held in the land in question? No.—Could then the plaintiffs (claiming under that return,) shew what interest or estate they had purchased? Certainly not. And the jury would have been entirely without any guide, to enable them to find for the plaintiff, any distinct and certain estate in the property in dispute.

The court are not compelled to make a presumption, if any be made, as is contended for by the appellants, which would be an intendment of "an omission by the sheriff, of words, which if actually inserted in the schedule according to such

intendment, would still leave the same uncertainty, and produce the same result in rendering the sale void." There are other words, besides "tract," "parcel," and "farm;" which if inserted would have made the return good. We are not to presume that the sheriff meant to use words implying that a portion only of the land was levied on. We may make another intendment, which will perfect the return. He may have intended to take in execution, and to sell an undivided half, fourth, or eighth, or some interest as tenant in common, or joint tenant. But as there is nothing to designate the interest or estate he designed to seize, and as the court cannot determine what omission he has made, they cannot assist the return of the sheriff, or supply any omission by intendment; and the schedule must be adjudged void for uncertainty.

The court will also perceive, that the party defendant, was a stranger in interest, and not bound, as a representative of *Thomas Greenfield*, by any of his acts; and the intendment the appellants wish them to make, would go to divest the legal possession of one not appearing to be bound by the return of the sheriff. Had *Thomas Greenfield* been the defendant in this case, the court might have applied to the return, the construction they give to deeds—that in phrases of doubtful meaning, the terms shall be construed most strongly against the grantor. But this rule cannot apply to the case of a stranger, who, for all that appears to the court, might have claimed by title paramount, or adverse to *Thomas Greenfield*.

CHAMBERS, Judge, delivered the opinion of the court.

This is a judicial sale, made for the purpose of carrying into effect the judgment of a competent court. The levy and sale were made by an acknowledged officer, in the regular course of duty, and no exceptions appear to have been taken to his proceedings for want of form, at the return of the execution, when on motion, any informality would have been examinable. The law regards such a proceeding with favour, and although it will not give effect to an instrument, or paper

Boteler and Belt *vs.* The State use of Chew, &c.—1836.

executed by such officer, if its terms are unmeaning, or so entirely vague, as to make it uncertain what was intended, yet every reasonable intendment will be made to secure *bona fide* purchasers, and to effectuate the object, which it was the duty, and as the law presumes, the design of the officer to accomplish. The presumption in such a case, is at least as proper and as strong as in the case of a grantee claiming against a grantor, when the utmost effect is given to the terms of the grant, *ut res magis valeat quam pereat*. It is admitted, and cannot be denied, that if this were the case of grantee against grantor, the whole tract would pass.

The rights of the defendant are not concluded in any respect by this construction. If she has a title, the sale will not affect it; if she has none, that fact presents no claim, upon which to entitle her to lessen the favour with which the law regards the proceedings of its officer, to change the presumption by which his acts are supposed to be rightly performed, or to narrow the construction given to his grant.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

BOTELER AND BELT *vs.* THE STATE *use of* H. M. and P. CHEW, *use of their creditors, &c.*—December, 1836.

When the existence of a record of a court is put in issue on the plea of *nul tiel record*, in proceedings of the same court, it should be proved by the production of the record itself for inspection by the judges; and when the record denied by the issue is of another court, it is to be proved by the production of an exemplification of it.

It is the practice of the courts in this *State*, to decide on the plea of *nul tiel record* of the same court, not by inspection of a record actually made up and produced; but on an inspection of the docket entries, minutes of the court's proceedings, original papers, &c. on file in the cause, the judgment or decree in which is put in issue, treating them as the record of the court; which practice this court is not disposed to disturb.

The duty required of clerks and registers by the seventh section of the act of 1817, ch. 119, to make up the records of the judgments, &c. therein men-

Boteler and Belt vs. The State use of Chew, &c.—1836.

tioned within twelve months, was not to give validity to such judgments, &c. but for security, and to furnish the ready and convenient means of evidence in other courts.

Upon the trial of the issue of *nul tiel record*, a file of papers and proceedings which had originated on the equity side of *Prince George's* county court, but which were subsequently removed to the court of Chancery, under the act of 1831, ch. 309, were offered by the plaintiff in support of his replication, averring them to be proceedings of the county court; and it not appearing that any action had been had upon them by the chancellor, or that they had been recorded in either court. It was *held*, that they were properly pleaded as proceedings of the county court; and that it was competent for the court, before whom they were so produced, by inspection, to ascertain and determine if they were the genuine original papers and proceedings of that court, stated and referred to in the replication.

In an action upon a bond, given by a trustee appointed by the decree of a court of equity, for the sale of certain mortgaged premises; it was held upon demurrer, that a replication alleging that the auditor had, under an order of the court, reported a certain sum to be due to the creditors of *H. M. C. & Co.* which the court had directed to be paid accordingly, and when the creditors were neither named in the report of the auditor, the order of the court or the replication, nor the amount to be paid to each, that the replication was ill, and that no judgment could be rendered thereon for the plaintiff.

The auditor in his account, should have set out the proper names of the creditors of *H. M. C. & Co.* and the amount to which each was entitled, and the replication (supposing the creditors competent to sue jointly,) should have done the same thing.

In pleadings on the part of plaintiffs, "certainty to a certain intent in general," is required, as well in relation to the parties as the subject matter, that the defendant in a subsequent action may be enabled to plead it in bar.

This was an appeal from *Prince George's* county court, and originated in an action of *debt*, brought on the 19th April, 1832, in the name of the *State*, against *Edwin M. Dorsey*, *Alexander H. Boteler*, and *Edward W. Belt*. The plaintiffs declared on the bond of the above parties sealed the 7th August, 1830, reciting, that by a decree of *Prince George's* county court, bearing date the 27th July, 1830, the said *Edwin M. Dorsey* was appointed trustee to sell certain real estate, the property of *Walter B. Brooke*, mortgaged to a certain *Lucy S. Brooke*, for the purpose of paying said mortgage debt; and containing the usual condition that the trustee would discharge his duty and obey the orders of the

court in the premises. After *oyer*, the appellants pleaded performance generally by the trustee, and the plaintiffs replied as follows:

“ That after the making of the aforesaid writing obligatory, and before the impetration of the writ original in this cause, such proceedings were had in the cause in the said writing obligatory and the condition thereof mentioned, and in execution of the decree in said cause therein also mentioned, that on the petition of *Philemon Chew*, on the behalf of the creditors of himself and *Henry M. Chew*, theretofore trading and carrying on merchandise, under the style and firm of *Henry M. Chew & Co.* made to the honourable *Prince George's* county court as a court of equity, and filed in the aforesaid cause in the said writing obligatory, and the condition thereof mentioned, it was on the 14th January, 1831, by the said court, amongst other things adjudged, &c.; that the auditor of the said court state an account between the mortgaged estate in the proceedings in the said cause mentioned and the said *E. M. Dorsey*, the trustee, and apply the balance of the proceeds of sale of said estate after payment of certain claims, incumbrances, and charges, to the discharge and extinguishment of the judgment in the said petition mentioned, and other debts, if any, of a similar grade, &c. And afterwards, to wit: on the 9th January, 1832, the said auditor in obedience to the said order, reported to the said court sundry accounts, whereby amongst other things, there was made due and payable to the aforesaid creditors of *Henry M. Chew & Co.* in satisfaction of the judgment in the aforesaid petition and order mentioned, the sum of \$932 54, to be paid by the said *E. M. Dorsey*, as trustee, out of the aforesaid balance of the proceeds of sale of the said estate; and afterwards, to wit: on the 17th April, 1832, by the said county court as a court of equity, it was adjudged and ordered, that the aforesaid report of the auditor be ratified and confirmed, and that the said *E. M. Dorsey* pay over to the said creditors of the said *Henry M. Chew & Co.* the amount appearing to be due to them by the aforesaid auditor's report, as by the record of

the aforesaid proceedings in said cause now remaining in said court will appear. And the said *State* further says, that afterwards, to wit; on, &c. at, &c. that the aforesaid creditors of *Henry M. Chew & Co.* presented a copy of the last aforesaid order of the said court and of the auditor's report to the said *E. M. Dorsey*, and then and there requested the said *E. M. Dorsey* to pay unto them the aforesaid sum of money which he was so as aforesaid by said court ordered to pay unto them, nevertheless, &c.

To which the defendants rejoined as follows :

1. That there is not any such record of a decree, and of the proceedings in the first suit mentioned in said replication, as the said plaintiff hath alleged, &c.

2. That there is not any such record of a judgment against *Walter B. Brooke*, in said replication mentioned, obtained by *H. M. Chew* and *Philemon Chew* for the use of their creditors on record remaining in *Prince George's* county court as, &c.

3. That after the audit as aforesaid in the replication mentioned, the said *H. M. Chew* and *P. Chew* for the use of their creditors, sued out of *Prince George's* county court, returnable to April term, 1830, of said court, a writ of *fieri facias* to the sheriff of said county to be directed, commanding him that of the goods, &c. of the said *Walter B. Brooke* and certain *William A. Hall* and *John Brooke*, (who were the securities of said *Walter B. Brooke*,) he should make the amount of said judgment so referred to as aforesaid to the auditor as aforesaid, that upon such writ of *fieri facias* such proceedings were had, that the then sheriff of the county aforesaid to whom the said writ was directed, did levy, of the goods, &c. of the said defendants to make the amount of said judgment, and did then and there return that he had so levied, and that the property remained in his hands not sold for want of buyers, as by reference to the said judgment obtained by *Henry M. Chew* and *Philemon Chew*, (for the use of their creditors,) and the writ of *fieri facias* aforesaid, and the return thereto of record in the court aforesaid will appear. By reason of which said premises the said plaintiffs elected to claim the

amount of their judgment aforesaid to be recovered at law, and the property on which said *fieri facias* was levied as aforesaid, still remains in the hands of the sheriff as aforesaid, answerable for said judgment, and the said *Henry M. Chew* and *Philemon Chew*, and the creditors for whose use the said judgment was rendered, have relinquished their claims upon the funds arising from the sale of the real estate as aforesaid, and this, &c.

4. That the creditors of said *Henry M. Chew* and *Philemon Chew*, for whose use the said judgment was entered, and who by the audit aforesaid and the confirmation thereof by the court, as is stated in the replication have been satisfied, the sum of money so allowed to them by the proceedings aforesaid, and this, &c.

5. That the creditors of *Henry M. Chew* and *Philemon Chew*, for whose use the said sum of money in the replication set forth was reported and allowed, never did give notice to the said *Dorsey*, that the said sum of money had been allowed to them in the suit set forth in said replication as in the said replication is alleged, and never did demand payment of the same by the said *Dorsey*, to the said creditors of *Henry M. Chew* and *Philemon Chew*, and this, &c.

6. That the said *Edwin M. Dorsey* never did receive any part of the said proceeds of sale as trustee as aforesaid, sufficient to pay and discharge the sum or any part thereof which was directed to be paid by the said order of *Prince George's* county court, sitting as a court of equity, and this, &c.

To which rejoinders the plaintiffs surrejoined as follows :

To first, third, fourth, and fifth rejoinders, a denial of the facts with a tender of an issue in which the defendant joined.

To the second and sixth rejoinder, a general demurrer and joinder.

The county court rendered judgment for the plaintiff on the demurrers.

Upon the trial of the issues of fact the defendant took the following exceptions :

1st EXCEPTION.—In the trial of the issue joined in this cause, upon the first plea of *nul tiel record*, the plaintiff to maintain the issue joined on his part and to prove to the court, that such proceedings were had as stated in his replication, offered in evidence to the court certain papers, which purported to be the proceedings in a suit originally brought into this court as a court of equity, wherein *Lucy S. Brooke*, was the complainant, and *Walter B. Brooke*, the defendant; and which suit after certain proceedings were had, was transmitted to the court of Chancery, at the instance of the persons for whose use this suit is brought, and by others. Papers, which he stated and offered to prove were the original papers in the said suit; he offered to prove the filing of said bill, the decree, trustees' report, petition of *Henry M. Chew & Co.* auditor's report, and orders thereon. To the admission of said papers, or any of them, the defendants by their counsel objected, and insisted that it was incumbent on the plaintiff to prove the said record, by the production of the record of this court, to which they refer in their replication. The plaintiffs thereupon by their counsel, offer proof to the court, that neither the proceedings in the suit aforesaid, in this court as a court of equity, as before stated, nor any part of them ever were recorded by the clerk of this court, but the papers therein without having been recorded, were transmitted to the court of Chancery, in virtue of an order of this court, dated the — day of —, 1834, that he had applied to this court during the present term, and obtained an order, that the clerk of this court should issue the following *subpœna duces tecum*. (Here followed the *subpœna* to *Ramsay Waters, Esquire*, to produce the papers in said cause and to testify, &c.)

Which *subpœna duces tecum* was accordingly issued, but has not been returned by the sheriff of *Anne Arundel* county, and the plaintiff did not prove or pretend that the said *subpœna duces tecum*, was delivered to the sheriff, or served by him, but offered to prove, that it was delivered to one *Jonathan Pinkney*, with a request to deliver it to the register of the court of chancery. There was no proof that the said *Pinkney* delivered said writ, or that it was served on said register, other

than it was given in evidence, in the trial of the issue by one *Philip Thomas*, a clerk in the office of the register, who appeared at the trial with the aforesaid original papers, purporting to be the original papers in the aforesaid cause in equity, and the said *subpœna duces tecum*, and proved that the same were delivered to him, by the said register, with directions to produce the same in court. The register of the court of Chancery did not appear and bring with him the papers aforesaid required by said *subpœna*, and no proof was offered that the proceedings in the said suit, originally brought in this court, sitting as a court as before stated, had not been recorded in chancery. The defendants by their counsel objected.

1. That the said papers were inadmissible to prove the record which is put in issue on the first plea of *nul tiel record*; and contended that no such *subpœna duces tecum* ought to have been issued, and that said papers ought not to be, and could not legally be brought into this court, that the plaintiff to maintain the issue aforesaid joined by him, on the first plea of *nul tiel record*, must produce the record which he sets forth in his replication to be in this court, and cannot prove the non-existence of the records, and then produce those papers to support the issues on his part.

2. That if the papers belonging to said suit could be admitted in evidence in this cause, still it does not and cannot appear to this court, that all the papers belonging to the case aforesaid, are now in the bundle produced and offered in evidence to the court.

3. That nothing but the production of the record, or a transcript of the proceedings verifying the matters now in issue can legally be offered by the plaintiff to the court, and warrant the court in giving judgment for the plaintiff, upon the issue as aforesaid, now to be tried by the court.

But the court over-ruled said objection, and it appearing to the court, by inspection of the papers aforesaid, that the matters set forth in the replication, and denied by the *first* plea of *nul tiel record* are true.

The court (*Stephen, Ch. J.* and *Key, A. J.*) thereupon and

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without the production of any record, or transcript of a record, admitted the said papers in evidence, and gave judgment for the plaintiff upon the issue aforesaid. The defendants excepted.

2d EXCEPTION.—Amongst other papers offered in evidence as stated in the first exception, which is made part of this, was an order of *Prince George's* county court passed in the said cause, in the words following, to wit: which was written upon the aforesaid petition set out in the replication, and was proved in fact to have been passed on the 14th of *January*, 1831.

<p>“<i>Lucy S. Brooke</i> vs. <i>Walter B. Brooke.</i>”</p>	}	<p>In <i>Prince George's</i> county court, as a court of chancery, upon the within petition of <i>Philemon Chew</i>, it is this 14th day of <i>January</i>, ordered by the court, that the auditor state an account between the mortgaged estate, in the proceedings mentioned, and the late and present trustee, ap- plying the balance, that will remain of the proceeds of the said estate, after paying off the incumbrances directed to be dis- charged by the order of <i>October</i> term last, as follows, to wit: first, to the extinguishment of the debt due the complainant, with interest and the costs of this suit; and secondly, to the extinguishment of the judgment mentioned in the said peti- tion, and other debts, if any, of a similar grade; and he is hereby directed, to take into his consideration, a judgment of <i>John Contee</i> and <i>William D. Bowie</i>, a copy of which is to be found among the papers in this cause; and the balance, if any, to distribute among the creditors of the said defendant according to the principle laid down by this order. The auditor is further hereby instructed and directed, to vary his statement, distributing the surplus aforesaid, according to the views and suggestions of any other creditor or creditors of said defendant, and also as he himself may think it ought to be stated.</p>
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EDMUND KEY.”

And the defendants thereupon insisted, that the said order materially varied from the order which is averred in the said replication to have been passed on the said petition, and does not support the matters set forth in the replication, the verity

of which is now to be tried. The plaintiff also offered in evidence the following order. "*Prince George's* county court, April 17th, 1832. Ordered by the court sitting as a court of equity, that the within report of the auditor be, and the same is hereby ratified and confirmed, and that *Edwin M. Dorsey*, the trustee, is hereby directed and required to pay over to the creditors of *Henry M. Chew & Co.* the amount appearing to be due to them by the within report of the auditor.

EDMUND KEY.

The defendants, by their counsel, objected that the same materially varied from the order which is averred in the replication, but the court (*Stephen, C. J. and Key, A. J.*) over-ruled said objections and were of opinion that there was no variance between the said orders as set forth in the said replication, and those produced in evidence. To which opinions of the court the defendants by their counsel excepted.

3d EXCEPTION.—In the trial of this cause the defendants to maintain the *third* issue joined on their part, offered in proof to the jury the judgment obtained by *Henry M.* and *Philemon Chew*, use of their creditors (for whose use this suit was instituted,) in an action at law, in *Prince George's* county court, upon the claim for the non-payment of which this suit is brought, and recovered at April term, 1829, of *Prince George's* county court, against the said *Walter B. Brooke*, that the said judgment was superseded by *William A. Hall* and *John Brookes*, and that afterwards there was issued a *fi. fa.* on said judgment against the said *Walter B. Brooke* and his securities on the said *supersedeas*, returnable to April term, 1830, which was returned by the sheriff of *Prince George's* county court "laid as per schedule and not sold for want of buyers." The defendants further proved by the schedule of the sheriff in said writ of *fi. fa.* that the property levied upon under the same, was the property of the superseder, *John Brookes*, that sundry writs of *vendi. exp.* were issued upon the said judgment, the last of which was returnable to the ——— term of *Prince George's* county court, 183—, and that prior to the return day of the same, and

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whilst the same was in the hands of the sheriff, the amount of said judgment was paid to *John Johnson*, the attorney of the plaintiffs in this action, by *John Brookes*, the superseder of the same, as aforesaid, and which said payment was made after the institution of the present suit, and the same thereupon entered for the use of the said *John Brookes*, for whose use the same is now prosecuted. Whereupon the defendants by their counsel pray the court to instruct the jury, that if the above testimony is believed by them, that then they cannot find for the plaintiffs upon the third issue, but the court refused this instruction. The defendants excepted.

4th EXCEPTION.—In the trial of this cause the defendants to maintain the *fourth* issue joined on their part (after the plaintiffs had offered evidence,) of their claim, offered proof to the jury, that *Henry M. Chew & Co.* for whose use this suit is entered, had instituted suit against *Walter B. Brooke*, for the amount of the claim now demanded, and had recovered judgment against him in *Prince George's* county court, which was duly superseded, and *John Brookes*, for whose use the suit is now entered, was one of the securities in said supersedeas; that afterwards the plaintiff issued out execution against the principal and the securities in the *supersedeas*, and the amount of said execution was settled by said *Brookes*, with *John Johnson, Esq.* the plaintiffs' attorney, some time after the institution of this suit; whereupon the defendants by their counsel pray the court to instruct the jury, that if they are satisfied from the evidence offered, that the amount of this claim was settled as aforesaid by *John Brookes*, after the institution of this suit, then the plaintiffs are entitled to their verdict on the fourth issue in this cause. But the court refused to give the instruction. The defendants excepted.

5th EXCEPTION.—At the trial of this cause the plaintiff to support the *fifth* issue joined on his part, and to shew that a notice had been given to *Edwin M. Dorsey*, the trustee aforesaid, and that a demand of the money which had been ordered to be paid to the creditors of *Henry Chew & Co.*

by the county court as a court of equity aforesaid, had been made of the said *Dorsey*, before the institution of this suit, proved by *John B. Brooke*, (who is an attorney of this court,) that on the 4th day of May, in the year 1832, aforesaid, he called upon the said *Dorsey*, and shewed him a copy of the order of this court as a court of equity, requiring him to pay to the creditors of *Henry M. Chew & Co.* the amount of the aforesaid judgment, and that he, the said *Brooke*, demanded of the said *Dorsey*, payment thereof, who made no objection to the authority of him, the said *Brooke*, to make said demand, observing only, that he, the said *Dorsey*, had anticipated, that such an order would be passed, and was sorry that he was not in a situation or able to pay the sum of money thereby directed to be paid. And the said *Brooke* also proved, that before the time of making the said demand, he the said *Brooke*, had been requested by *John Johnson, Esq.* to assist him, the said *Johnson*, in bringing to a close all of the unsettled business in *Prince George's* county court, in which he, the said *Johnson*, was professionally concerned, which he, the said *Brooke*, had agreed to do, and in virtue of this agreement, his, the said *Brooke's* name, had been associated with the said *Johnson's* in most of the cases, which the latter had upon the docket of the said court, and in the case of the particular judgment herein before referred to, the name of the said *Brooke* had been entered as the attorney of the plaintiffs, upon the docket of said court, for April term, 1831, which fact also appeared by the production of the docket for that term. The plaintiff further proved, that the writ in this cause was issued upon the order of the said *Brooke*, who has always continued to prosecute the same; and also offered in evidence the original petition filed in the cause in equity, of *Lucy S. Brooke* against *Walter B. Brooke*, which is herein before referred to, and proved that the same is in the hand-writing of said *John B. Brooke*, and signed by him, and that the order is also in his hand-writing, and was passed by the court upon his motion, and the said *John B. Brooke* further proved, that he filed said petition and the said judgment as an

exhibit with it, because *Richard H. Brookes*, then the auditor of said court as a court of equity, when he was about to audit certain claims against the estate of the said *Walter B. Brooke*, and which had been filed in the before mentioned equity case, of *Lucy S. Brooke* against the said *Walter B. Brooke*, stated to him, the said *John B. Brooke*, that the judgment in question, had not been filed as a claim in said suit, and that *John Brookes*, the brother of him, the said *Richard H. Brookes*, who was bound as a surety for the said judgment required it to be done as an act of justice to him, the said *John Brookes*, and that if it was not done, he would take advantage of the failure or neglect to do so if he could, by resorting to a court of equity for relief against the judgment. The said *John B. Brooke* further proved, that *Messrs. Aldridge & Higdon*, or *Aldridge, Higdon & Co.* who were creditors of the said *Henry M. Chew & Co.* knew that he, the said *Brooke*, had been employed as aforesaid by the said *Johnson*, as he had, subsequently to the time of his being so employed, an interview with one of the firm, in which the circumstance was mentioned. The defendants then proved by *John Johnson*, formerly an attorney also of this court, that the claim of *Henry M. Chew & Co.* against *Walter B. Brooke*, the amount of which was, by the order of said court as a court of equity aforesaid, directed to be paid to the creditors of the said *Henry M. Chew & Co.* was with a number of other claims put into his hands as an attorney, to be collected, by suit or otherwise, and by agreement and direction of said *Henry M. Chew & Co.* the moneys due thereon when collected were, by said *Johnson*, to be distributed among the creditors of the said *Henry M. Chew & Co.* That the creditors for whose use the said claims, (including the one against *Walter B. Brooke*, as aforesaid,) were placed in the hands of the said *Johnson*, being numerous, he the said *Johnson*, instead of entering the suits for the use of the said individuals, among whom the money, when collected, was to be distributed, directed the said suits, including the one against the said *Walter B. Brooke*, to be entered for the use of the creditors

of the said *Henry M. Chew & Co.* That the said creditors never filed their claim in the suit in equity aforesaid, but relied on and proceeded against the said *Walter B. Brooke*, and his sureties, in a supersedeas, (one of the said sureties being the said *John Brookes*, for whose use the present suit is now entered,) and were proceeding against them until the month of December, 1832, when the said *John Brookes*, as surety aforesaid, gave to the said *Johnson* his note, for the amount of the claim of *Henry M. Chew & Co.* against the said *Walter B. Brooke*; which was accepted by said *Johnson*, and by his direction this suit was thereupon entered for the use of the said *John Brookes*, intending by said entry, to give to said *John Brookes* all the benefit of said judgment, to which the original plaintiffs were entitled, before the said *John Brookes* had passed his note as before stated, to the witness. And the said *Johnson* further stated, that although the claim against the said *Walter B. Brooke* was not filed by the creditors of *Henry M. Chew & Co.* yet he was aware that a proceeding was had in the equity case aforesaid, for the purpose of having the said claim paid out of the fund in that court, in which he acquiesced, though he considered said proceeding as intended to protect the interests of the said *John Brookes*; he further states, that *John B. Brooke, Esq.* who has been examined, as a witness, and by whom the claim was filed, had general instructions from him, to appear in all the cases in which he, *Johnson*, had been professionally concerned, and to adopt such proceedings as to him, *Brooke*, might appear necessary for the interests of his (*Johnson's*) clients. Whereupon the defendants, by their counsel, prayed the court to instruct the jury.

1. That the jury must be satisfied from the evidence, that before the institution of this suit a demand was made of the amount now claimed of the trustee, either by the creditors of *Henry M. Chew & Co.* or by some person authorized by them to demand and receive the same.

2. That the petition filed by *Philemon Chew*, on behalf of himself and *Henry M. Chew*, and the creditors of *Henry M. Chew & Co.* being the petition before recited, and the pro-

ceedings of the court of equity, grounded as aforesaid, upon said petition, and the before recited testimony of *John B. Brooke* and *John Johnson*, do not prove that the said *John B. Brooke* was authorized to demand and receive from the trustee, the sum which by the order aforesaid the trustee was directed to pay to the creditors of *Henry M. Chew & Co.*

But the court (*Stephen, Ch. J.* and *Key, A. J.*) refused to give the *second* part of the instruction, and were of the opinion that from the proof aforesaid, if the jury believe it, they may find that the said *John B. Brooke* was duly authorized to make the demand, and receive of the trustee the money, which, by said order in equity, was directed to be paid to the creditors of *Henry M. Chew & Co.* The defendants excepted.

The verdict and judgment being for the plaintiff, the defendants prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and DORSEY, ARCHER, CHAMBERS, and SPENCE, Judges.

A. C. MAGRUDER, for the appellants, contended :

1. That the evidence offered by the plaintiff was inadmissible, as a record ought to have been produced. The first exception is upon the plea of *nul tiel record*. The plea refers to the decree in equity, and calls on the plaintiff to show that his record corresponds with his plea. The burthen is upon him. The judgment on the first exception is therefore erroneous. If the plaintiff had counted on the special circumstances, he might have recovered, but the *sole* matter in issue, was the existence of such a record, *as of Prince George's* county court. He could offer no substitute for it under the form of pleading. 1 *Star. Ev.* 2 *pt.* 150. 3 *Star. Ev.* 4 *pt.* 1277. Again, the proof offered, was inferior evidence ; original papers in chancery cannot be carried from court to court ; the register did not attend with those offered, and they were not a record of any court. Before papers can constitute a record, their identity must be proved by the proper officer ; and that those offered comprise *all* the papers.

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2 *Bac. Abr. Wash. Va. Rep.* 215. The character of the witness who attended with the papers is not stated, and he could know nothing of them. Even the clerk of the county court, with whom the papers were originally filed, was not sworn. Their origin is not established by proof; their mere production does not establish to what court they first belonged. *Hewson vs. Brown.* 2 *Burr.* 1034. The other exceptions are not material.

Upon the demurrer, to the second and sixth rejoinders we may go up to the first error. The plaintiff's declaration and replication do not disclose any person, who has a right to maintain the action, which is fatal. *Gould, Plea.* 87, *sec.* 60, 62, parties should be described by their proper names. The rule which requires certainty as to persons, demands this. The originally uncertain description under the order of court relied on here, is not aided by averment. *Dashiel et al vs. The Attorney General,* 5 *Har. and John.* 392. And no right accrues until demand upon the trustee. *State use Oyster vs. Annan.* 1 *Gill and John.* 450. The person who makes the demand must be authorized to grant a discharge to the trustee. The order relied on is like an order to pay the money to the person entitled to it. A supplemental order is essential to its intelligence. The order is to pay the creditors of *Chew*, and the replication is that they requested payment. There was no audit to ascertain the several rights. The chancellor alone could do that judicially. The replication is therefore defective in not averring a demand on *Dorsey*. The petition of *Philemon Chew* does not alter the question, as a decision upon that could not affect his creditors who were not parties to it.

The 6th plea insists that the trustees never received the money. This is admitted by the demurrer, and is a good defence.

PRATT, for the appellees.

The object of the *first* exception was to bring up the question, whether the original papers in this cause, which com-

menced in *Prince George's* county court, and was afterwards transmitted to the court of Chancery, can be offered in evidence. That they were original is not disputed. The appellees offered to prove them to be original papers at the time of the objection taken to their admissibility. Under the act of 1817, *ch.* 119, *sec.* 7, the clerk of the county court should have recorded them, which he did not do. When they were transmitted to chancery, the register was under no obligation to record them. They were not proceedings of his office. To require a record then, technically made up, is, in the one case, to make the appellees liable for the default of the county court clerk, and in the other to exact a duty from the register in chancery which the law does not impose on him, and consequently *his* record would not be evidence. The act of 1817, is penal and must be strictly construed. *Wilson & Gibbs vs. Conine*, 2 *John. Rep.* 280. *Buller N. P.* 226. If the papers had remained in the county court, they would have been received as the best evidence the case could admit of. An exemplification is only evidence from the inconvenience of admitting the originals, and the nature of the proof offered shows the competency of the original papers. The issue was framed upon their existence. The authority cited from 1 *Star. Ev.* 189, is with the appellees. When the trial is in the same court, it is by inspection; otherwise, when in another court. 1 *Star. Ev.* 254. These papers were transmitted under authority of law. They came attended by a clerk of the register in chancery, and were the only legal evidence of the proceedings of the county court left. The appellants cannot escape from these results except by denying the papers offered to have been originals; and that was conceded by them.

Upon the demurrer to the second rejoinder, the defendants admit they are wrong, but insist on their right to go back to the first error in pleading, which they contend to be in the plaintiff's replication. In this case they are precluded from denying any thing necessary to the validity of the order of court. It ascertains a sum due to the creditors of *Chew &*

Co. and that they were entitled to recover it. It is objected, that the creditors are not known, and cannot demand payment of the trustee. The demurrer, admits notice to, and demand of the trustee, which answers the case of the *State use of Oyster vs. Annan*. That the order was not too vague, he cited: *Pate vs. Bacon & Co.* 6 Mun. 219. 2 L. Ray. 1532. *Butler & Belt vs. State use Bowie & Contee*, 5 Gill and John. 520.

ALEXANDER, also for the appellees.

There are but two questions; the others are abandoned.

1. Is the demurrer sustainable upon the plea of *nul tiel record*. This involves the sufficiency of the decree. The circumstances show, that the plaintiffs have sustained an injury. The decretal order is correctly set forth. No valid defence appears upon the pleadings. The objection goes only to the form of pleading. A decree must be pleaded as a record. No other form is known.

2. Was the evidence offered admissible. That proof which alone is attainable must be admissible. The court will not reject the only evidence of which established forms of pleading are susceptible. The place of a lost record may be supplied by proof, and clerical negligence leads to the same result. Original papers may be used in the court of their creation; a copy is for other courts. Yet all cases of judgments pleaded conclude *prout patet per recordum*.

R. JOHNSON, for the appellants, in reply.

The first exception presents two inquiries:

1. Whether under the circumstances which the plaintiff proposed to prove, the papers offered could have been received.

2. Whether the court below, after they received the supplemental proof, decided correctly in favour of the plaintiff on the plea of *nul tiel record*.

The demurrer embraces two inquiries:

1. Whether the plaintiff's replication discloses an action

on this bond, by the averment of any fact, which upon any state of pleadings amounted to a breach of the bond.

2. Whether if, by any form of pleading, the plaintiff could have made the facts stated a breach of the condition; has he made any such statement of a claim on the record.

The consideration of the defendants' exception brings before us, the duties of the clerk of *Prince George's* county, and the register in chancery. In one branch of the argument the right is predicated upon the hypothesis, that it was the only kind of proof of which the replication was susceptible, and that as the order was passed in execution of the principal decree of July, 1830, and the papers not transmitted from the county court to chancery until 1834, the twelve months allowed under the act of 1817, for making the record had elapsed, and that no record being made, the original papers were the only evidence. I contend that in all causes transmitted to chancery coming within the act of 1817, whether recorded before or not, they must be recorded there, and so must the court construe the register's duty under the act of 1817. In this view, so far as respects the clerk of the county court the twelve months are immaterial. In any other view, if the orders were fit to be recorded, and were ordered to be transmitted immediately after their passage, under the argument on the other side, they could not be recorded at all. Injustice would result to the clerks from the operation of the act of 1831, if the appellees are right. But the court will construe the acts of 1817 and 1831 in connection, and say upon the removal of the cause, the clerk of the county court is discharged from the duty of recording. And if the register is not to record in such a case, then it presents the anomaly that a paper fit for record—required to be recorded—cannot be recorded in any court. Neither by the clerk from whose possession it was taken, nor by the officer to whom it was transmitted. The policy of the *State* demands that the officer who has the possession in fact should hold and record it, and not send it from one county to another when as evidence it was essential. Under the

act of 1831, a clerk could not retain a paper twelve months for record, for then an immediate decision of the cause, contemplated by that act could not be had. The suggestion stops the cause, cuts down the power of the court where the jurisdiction first attached, and sends the cause to another forum for despatch.

In legal contemplation, the act of 1817, after twelve months, considers the proceedings as recorded, otherwise a record made after twelve months would be no record. The term is only a direction to the officer prescribing his duty—to insure his punctuality. It does not bear on the validity of the record.

The act of 1831, makes a cause removed with reference to chancery, a case originating in that court. The decision in *Strike and McDonald*, does not impugn this view; there the time for an appeal had expired before the cause was removed, and the chancellor proceeded as if the cause had originated before him. This practice was sustained, and shows that the papers could only be recorded in chancery.

When a record is involved, the whole record must be produced. We are not to have two records of the same cause, made at separate stages. The act of 1817, in the selected cases requires all papers to be recorded. Insisting that the cause, ought to have been recorded in chancery—there is no pretence of evidence in the plaintiff's offer of proof, that it was *not* recorded in chancery. The presumption is, that it was then recorded, and thence a record might be, and ought to have been produced.

All the orders are to be read as the orders of the chancellor. The act of 1831, makes them his by adoption. *Prince George's* county court are strangers to the cause after its transmission to chancery—it ceases to be a record of the transmitting court, and the question presented under the exception then is, can a court, upon the plea of *nul tiel record*, with reference to the judgment of another court, act upon the original papers, and is their inspection proof that they are the papers of another court? A court can inspect its own rolls,

but the record of another court can only be proved by an exemplification.

The exception not only embraces the question of the admissibility of the evidence, but the effect of the evidence *per se*. The order of the proof is not material. *Davis vs. Calvert*, 5 *Gill and John*. 269.

This exception also brings up the question of the identity of the record averred, and the one offered in proof. This is a question of variance, and is still open. The fact of the order of 1831, is not in issue, but that at the time of pleading, the record was one of *Prince George's* county court. If we are right as to the construction of the act of 1817, that after removal the record became a chancery record, the plea is erroneous. The register's exemplification would have maintained it as a record of chancery, and no averment that it was a record of *Prince George's* county court could be maintained.

The rule cited from *Bacon Abr.* never existed in *Maryland* since the act of 1817; from that time chancery became a court of record.

The same kind of proof required upon such a plea, in any one of the courts of this *state*, must be required in them all. If original papers were necessary in *Prince George's*, because not recorded there, and could not be recorded in chancery, then original papers must be carried over the state which would lead to great confusion in practice. *Ayres vs. Grimes*, 3 *Har. and John*. 95.

Upon the demurrer, he contended: The error of the appellees' argument was, in considering the trustee a party to any such order as the one in this cause. An error announced in the case of *Oyster and Annan*. A trustee is not a defaulter until demand, not being a party to the order. That case also decides, that the giving the bond does not constitute the cause of action. The bond is contingent. The state has no right to sue, unless she shows herself, or some named party, interested in the bond. Then the pleader must state the cause of action intended to be recovered, and the certainty which is required to free the pleadings from substantial defects,

relates to the party as well as to the cause of action. The same principle runs through the whole law, to reduce the matter in issue to a certain clear and designated point. The court must know who are the litigant parties. The *cestui que use* of the suit is not only the plaintiff as to the cause of action, but it is against him, the defendant has his remedy for costs. How can the creditors of *Chew* be liable. What property, what person is answerable. If by any form of pleading, the order of the court can be recovered on, there is no averment to show who are the creditors of *Chew*, and the objection goes to the cause of action. Neither could the defendants defend themselves against a second action on the decree, by pleading payment. It would involve him in as many distinct issues as there may be creditors; force him into various inquiries, all foreign to the spirit of the common law. The effect of this decree is, that the trustee shall pay those thereafter ascertained to be creditors of *Chew*. It leaves open the inquiry, who are the creditors and their rights, *inter se*, and consequently as this ascertainment has not been made, no averment to that effect, there is no right of action on the record.

BUCHANAN, Ch. J., delivered the opinion of the court.

The suit is upon a bond of *Edwin M. Dorsey* to the State, with the appellants as his sureties, as a trustee appointed by a decree of *Prince George's* county court, to sell certain real estate, the property of *Walter B. Brooke*, for the payment of a mortgage debt to *Lucy S. Brooke* in the recital mentioned. The condition of which bond, is for the performance by the trustee of the duties required by that decree, or by any future decree, or order in the premises.

All the exceptions taken at the trial below being abandoned by the counsel for the appellants except the first, and (it is enough for us here to say, as we think) properly, there remain but three questions to be considered. The replication to the plea of general performance, assigns as a breach of the condition of the bond, the non-payment by *Edwin M. Dorsey*

of the sum of \$932.54½ to the creditors of *Henry M. Chew & Co.* which it is stated he was directed to pay to them, by an order of the county court of *Prince George's* as a court of equity, of the 17th of April, 1832, made in the case in which he was appointed trustee, as by the record of the proceeding in that case (as is alleged) now remaining in that court will appear. To this, there is in the rejoinder a plea of *nul tiel record*, on which issue was joined—and to support the issue on the part of the plaintiff below, certain papers, purporting to be the original papers and proceedings in equity, in *Prince George's* county court, mentioned in the replication, in which *Edwin M. Dorsey* was appointed trustee, were produced and offered in evidence to the court. The admissibility of these papers was objected to, but being admitted by the court on inspection, without other proof of their identity, as the original papers, stated in the replication to be of record in the *Prince George's* county court, and without the production of a record, or transcript of a record of the proceedings; and the issue that they were produced to sustain, evidence in favour of the plaintiff below, the bill of exception now under consideration was taken; which presents two questions:—

1. Whether the production of a record or transcript of a record of the proceedings, was not necessary to maintain the issue on the part of the plaintiff below, and the original papers, without such record or transcript inadmissible for that purpose?

2. Whether, if the original papers alone were admissible, and sufficient for that purpose, the papers produced should not have been proved to be the original papers in the cause referred to in the replication, otherwise than by inspection by the court. Which will be considered together. The rule as laid down in treatises upon evidence is, that when the existence of a record of a court is put in issue on the plea of *nul tiel record* in proceedings of the same court, it should be proved by the production of the record itself, for inspection by the judges; and that when the record denied by the issue

is of another court, it is to be proved by the production of an exemplification of it.

Before the act of 1817, ch. 117, it was the duty of the clerks and registers of the courts of justice of this state, to record the judgments, &c. of their respective courts, not as in England by engrossing them upon the parchment and delivering them into court, as the permanent rolls of the court, but by transcribing them into books to be kept in their respective offices for that purpose, from the minutes of the court, the docket entries, and the original papers and documents filed in the cause. Which duty was greatly neglected; and exemplifications when required, commonly made out, not of records technically, but from the docket entries, minutes of the court, &c. and it has been the practice of the courts of this *state*, to decide an issue on the plea of *nul tiel record* of the same court, not by inspection of a record actually made up, and produced, but on an inspection of the docket entries, minutes of the court proceedings, original papers, &c. on file in the cause, the judgment or decree in which, is put in issue; treating them as the record of the court—which practice we are not disposed to disturb; not perceiving any sufficient reason why the original proceedings, papers, &c. on file, should not be deemed of as high credit, as a transcript from the record books made out by the clerk from the same materials; nor why the issue on the plea of *nul tiel record*, may not as well be tried and decided on inspection of them by the court, considered and treated as the record, as on an inspection of a record, made out from them in a book by the clerk, who is not supposed more capable to examine, or more critical and exact, in his examination than the judges.

The technical objection, that the existence of a record should be proved by the production of the record itself, as the best and highest evidence being removed, by considering and treating the original proceedings, &c. as the record, and in *Burch and others vs. Scott*, 1 *Gill and John*. 397, it was held by this court, that a decree of the court of chancery is to be considered and taken as enrolled, when it is signed

by the chancellor, and filed by the register, and the term has elapsed during which it was made.

The proceedings and orders referred to in the replication, as of record in the *Prince George's* county court, were had, and made in that court, sitting in equity, and the orders being signed by the court, and filed by the clerk, and pleaded after the lapse of several terms of the court, are in conformity to the decision in *Burch and others vs. Scott*, to be taken and considered as enrolled.

The 7th section of the act of 1817, makes it the duty of the clerks and registers of the courts of justice in the state, to make up at full length in well bound books the records of all the judgments, decrees, proceedings, &c. of their respective courts in cases of the character designated, within twelve months after the time, when such judgments, decrees, and proceedings, shall be rendered, made, or had: not to give validity to such judgments, &c. but for security, and to furnish the ready and convenient means of evidence in other courts; which as relates to the proceedings in question, which are of the character mentioned in the 7th section of that act, was not done, and as appears by the evidence had not been done, at the time of the trial of this cause below. But they were on the files of the *Prince George's* county court at the time of filing the replication, though afterwards transmitted to the court of chancery, under the act of 1831, ch. 309, authorizing the proceedings in suits in equity, in any of the county courts of the first judicial district, to be transmitted to that court, and taken from thence, and produced to the *Prince George's* county court, on the trial in this cause, of the issue joined on the plea of *nul tiel record*.

It does not appear that they were ever recorded in the chancery court, or that any proceedings were had, or decree made in that court, to require or authorize the recording of them there. They were there, as proceedings had in the *Prince George's* county court, with authority only to the chancellor, given by the act under which they were transmitted, to act upon them as if they had originated in the

court of chancery; with no action of the chancellor upon them as far as appears. They could not therefore, for any thing appearing, have been properly pleaded as a record of the court of chancery. And if they had been, the production of them would not have sustained the plea being in fact proceedings in another court.

The clerk having neglected to do his duty, they were the best and only evidence that could have been offered; and when produced to the *Prince George's* county court, that court was authorized and competent, by inspection, to ascertain and determine, whether they were the genuine original papers and proceedings of that court, stated and referred to in the replication. And having done so, being on the files of that court at the time the replication was put in, (which is not denied,) it did right in considering and treating them as the proceedings and records of that court, for the purposes of the issue before it, notwithstanding they had been transmitted to the court of chancery.

The remaining question arises on the general demurrers to the 2d and 6th rejoinders, both of which are admitted by the counsel for the appellants to be immaterial and bad; but the demurrers reach back through the whole record, and attach to the first substantial defect in the pleadings, which is found to be in the replication.

Edwin M. Dorsey was appointed by the *Prince George's* county court sitting in chancery, a trustee to sell the real estate of *Walter B. Brooke* for the payment of a mortgage debt to *Lucy S. Brooke*, and gave his bond, with condition for the performance of the duties required by that decree, or by any future decree or order in the premises; and having sold the property, an order was passed by that court, directing the auditor to state an account, between the mortgaged premises and the trustee, distributing the proceeds among the creditors of *Walter B. Brooke* as therein directed. In pursuance of which order, the auditor stated and reported an account, charging among others, a debt as due to the creditors of *Henry M. Chew & Co.* without naming them or stating the

amount due to either of them, which account so stated, was ratified and confirmed by the court, by an order directing *Edwin M. Dorsey*, "the trustee, to pay over to the creditors of *Henry M. Chew & Co.*" without naming them, the amount so charged in the account as due to them. For the recovery of which the suit was brought: and the breach assigned in the replication is, the non-payment to the creditors of *Henry M. Chew & Co.* without naming them, or any, or either of them, of the amount so charged in the auditor's account, and by the order of the court directed to be paid by the trustee.

The executing the bond by *Dorsey*, the trustee, and his sureties, gave no cause of action; that, could only arise from a breach of the condition for which no person is authorized to put the bond in suit, but one entitled to the fund, or a portion of it. The *state* has no interest in it, and he at whose instance a suit is brought in the name of the *state*, being the real plaintiff, should set out and disclose his name in the pleadings, that his title and right to sue may appear; and an opportunity of meeting and resisting his claim be fairly afforded to the defendant, which is not done in this case. Who are the creditors of *Henry M. Chew & Co.* or to what proportion of the sum charged to be due to them, they are respectively entitled does not appear, either in the auditor's report, the order of the court ratifying and confirming that report, and directing the amount to be paid over to them by the trustee, or in the replication assigning as a breach of the condition of the bond, the non-payment of it; but they are merely styled in each, the creditors of *Henry M. Chew & Co.* who it appears had obtained a judgment against *Walter B. Brooke*.

To whom, claiming as a creditor of *Henry M. Chew & Co.* was the trustee to make payment, and to what amount? The replication does not state. The auditor in his account should have set out the proper names of the creditors of *Henry M. Chew & Co.* interested in the fund in the hands of the trustee, stating the amount to which each was entitled.

And there appearing to be many separate creditors, claiming different amounts, and the judgment mentioned in the account, being entered generally for their use, the replication supposing them to be competent to institute a joint suit on the bond in the name of the *State*, should have done the same thing, showing who were the real plaintiffs, their right to sue, and the amount to which they were respectively entitled; that the defendants, so advised, might frame their defence accordingly, and prepare themselves to show according as the fact might be, that they were not the creditors of *Henry M. Chew & Co.* and not entitled to sue the bond, or that they had been paid pursuant to the order of the court. In an action, not upon the bond, but upon the order of the *Prince George's* county court, for the amount stated in the auditor's account, to be due to the creditors of *Henry M. Chew & Co.* if any action could be sustained on that order, a description of the plaintiffs in the declaration as "the creditors of *Henry M. Chew & Co.*" without setting out their proper names, would clearly be insufficient—and if so, on what principle in an action on the bond, can a like description in the replication assigning breaches, be deemed good. In declarations, replications, and other pleadings, on the part of the plaintiffs, "certainty to a certain intent in general," as it is termed, is required, as well in relation to the parties as the subject matter, that the defendant, in the event of a judgment being rendered against him, may be enabled to plead it in bar of any subsequent action for the same cause—which could not be the case here, for the want of a sufficient description of the plaintiff in the replication. A judgment rendered against the defendants on this replication would be no bar to an action subsequently brought in the name of the *State*, on the same bond for the same cause, at the instance of persons stating themselves to be the creditors of *Henry M. Chew & Co.* and setting out their proper names in the replication; as it would not appear, from a comparison of the two replications, that they and the persons suing in this cause, whose names are not disclosed, were the same, nor

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could their rights be affected, by a judgment in favour of unknown persons, styling themselves the creditors of *Henry M. Chew & Co.* without further description, in a suit to which they did not appear to have been parties, and thus the defendants might be made to pay the same sum twice.

We think, therefore, that the court below erred in sustaining the demurrers.

The auditor's account is improperly stated, and in our opinion, the order ratifying and confirming it, was improvidently made.

The judgment must be reversed with costs.

JUDGMENT REVERSED.

ELIZABETH LAWRENCE vs. HICKS AND OTHERS.

December, 1836.

During the pendency of a bill in the Court of Chancery, the legislature by the act of 1835, ch. 339, authorized any of the parties to the cause, to have transmitted to the Court of Appeals a transcript of the chancery proceedings, for the purpose of taking the opinion of the appellate court—touching the validity of certain acts of assembly involved in the said chancery proceedings; and such other points, as the parties to the controversy might by agreement have submitted to the Superior Court with a provision that, the opinion of the latter in the premises should be certified to the Court of Chancery, and be binding in that court as to the law thereby decided.

Under this law, and before a decree had been passed by the chancellor, one of the parties brought the record up, when it was held, that the law was unconstitutional and void, and the appeal dismissed.

APPEAL from Chancery.

The bill in this cause was filed on the 22d June, 1827, by *Robert Hicks* and wife against *Elizabeth Lawrence* and many other persons. Before the cause was ready for the decree of the chancellor, the legislature passed in relation to this case, the act of 1835, ch. 339, entitled, an act for the relief of *John Reynolds* and others, of Washington county, and authorized among other matters any of the parties to the afore-

said case then depending in chancery “to cause a transcript to be made of the said bills, and the answers, and of all exhibits and proceedings heretofore filed, or had in the said cause, and of all exhibits that before transmission of the proceedings as hereinafter mentioned may be filed, and the register of the court of Chancery is required to transmit the said transcript to the court of Appeals, which court, at the first term to which said transcript shall be transmitted, shall upon said bills, answers, exhibits, and proceedings, adjudge and pronounce its opinion upon the validity of the acts of assembly, in a constitutional, or other point of view, passed to give effect to the several deeds mentioned in said bills, so far as any of the said acts shall upon argument before said court, be brought into question, or submitted for consideration touching their validity as aforesaid, and also upon any other points that may, by agreement between any of the plaintiffs and any of the defendants be submitted to the said court for decision; and the decision and opinion of the said court of Appeals in the premises, shall be certified to the court of chancery, and be binding in that court, as to the law thereby decided.”

The main object of the parties was to obtain an early decision of the appellate court on the constitutionality of the acts of 1781, ch. 3, and 1816, ch. 164.

By the constitution of the state of Maryland, act of 1804, ch. 55, sec. 5, it is declared “that there shall be a court of Appeals, and the same shall be composed of the chief judges of the several judicial districts of the state, which said court of Appeals shall hold, use, and exercise, all and singular, the powers, authorities, and jurisdictions heretofore held, used, and exercised by the court of Appeals of the state, and also the appellate jurisdiction heretofore used and exercised by the general court.”

By the 56th article of the constitution of 1776, it was declared “that there be a court of Appeals, composed of persons of integrity and sound judgment in the law, whose judgment shall be final and conclusive in all cases of appeal

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from the general court, court of chancery and court of admiralty.”

At November term, 1836, no decree having then been passed by the chancellor, and the cause then depending in chancery, *Elizabeth Lawrence* under the act of 1835, chap. 339, brought a transcript of the record as it stood on the 27th November, 1836, into this court for the purpose of procuring the judgment of this court upon the constitutionality of the acts aforementioned.

The cause was coming on to be heard before BUCHANAN, Ch. J. STEPHEN, ARCHER, DORSEY, and CHAMBERS, Judges, when the court intimated an opinion that, before a decree was passed by the chancellor, an appeal would not lie, and the legislature could not constitutionally convert this court from a court of review, into one of original jurisdiction; when that preliminary question was argued by

JONES, for the appellant, and in support of the jurisdiction of the court to execute the act of 1835, ch. 339, under which the appeal was taken.

The question is as to the meaning in its largest sense of appellate jurisdiction. It is not confined to cases brought before the court upon appeal or writ of error. Appellate jurisdiction may be exercised in some other mode—an appellate court, to be sure, cannot exercise original jurisdiction, but it may supervise the inferior courts, in other modes, besides appeals or writs of error,—such as *mandamus* and *certiorari*. The term appeal *ex vi termini* does not require there should be a judgment to revise or error to correct. Original jurisdiction means the first moving of the proceeding, and that, this court cannot exercise; but it may when a cause has been instituted in another court take possession of it at any term and in any mode. He referred to the 2d sec. 3d art. constitution of the United States, to shew the difference between the courts of the *United States* and the courts of Maryland. The former courts are expressly confined to the conferred jurisdiction.

2. The next question is whether the legislature may not confer appellate and original jurisdiction on the same court. *56th art. constitution of Maryland.*

It might with the same propriety be said, that because a chancery court was established *eo nomine*, that common law powers could not be conferred on the chancellor, or that chancery jurisdiction could not be conferred on the courts of law.

There is not in the constitution of Maryland a definition of the powers of the court of Appeals. The quality of their judgments is defined, and they are declared conclusive, but not the extent of their jurisdiction. The giving them original jurisdiction does not make it the less a court of Appeals. *Constitution of 1804, ch. 55, sec. 5.* It might as well be said that courts of original jurisdiction could not exercise appellate, as that appellate courts could not exercise original jurisdiction—yet the former is frequently the case.

The act of 1832, ch. 197, speaks of the judges of the court of Appeals, and that designation has nothing to do with their character of chief judges of the different districts. The authority given by that act is given to the members of this court, *qua* judges of the court of Appeals, as much so as if the chief judges of the county courts and the judges of the court of Appeals were distinct persons. And how can it be said that a power can be given to one individual component part of a tribunal, and not to the whole tribunal; and yet the judges of this court separately have executed the act of 1832, ch. 197.

Upon the definition of the word appeal he referred to, *Tom. Law Dictionary*, 99. Appeal, 3 *Black. Com.* 38, 41, 53, 57, (*Arch'd Ed.*) *Ex parte, Watkins*, 7 *Peters*, 579.

R. JOHNSON, for the appellees, also insisted on the jurisdiction of the court.

The act of 1835, ch. 339, sec. 1, does not call on this court to decide a question of fact, but purely a question of law. It is the same thing as if the legislature had autho-

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rized the court of chancery to send an issue of law to this court.

Whether a power may be exercised by either of the departments of the government depends not upon whether it has been granted but whether prohibited. If not prohibited it may be exerted. This is not the case under the constitution of the United States. There the grant of the power to one department takes it from any other. *Marbury vs. Madison*, 1 *Cranch*, 137, and consequently when original jurisdiction is given to the Supreme courts in certain cases, the power to give them jurisdiction in any other is taken away. And the grant of appellate power to the Supreme court deprives Congress of the power to take the appellate jurisdiction away. *Cohens vs. Virginia*, 6 *Wheat.* 264. Whenever, therefore, either appellate or original jurisdiction is given to the Supreme court it is exclusive.

The ground on which it is supposed the legislature have no right to give this court original jurisdiction is, the affirmative grant of appellate powers.

But if this be so, the legislature can neither enlarge nor take away the appellate jurisdiction of this court as it existed at the time of the adoption of the constitution—and yet this is constantly done.

2. But this is not calling on the court to exercise original jurisdiction, strictly so called. The act only authorizes this court to give its opinion in advance. In England the court of Chancery frequently sends issues of law to be decided by the courts there, who hold appellate powers over the court of chancery, and there can be no difference between such a proceeding and a law requiring this court to give its opinion in anticipation of the chancellor.

The 5th section of the amended article of the constitution gives this court the same jurisdiction as the old court of Appeals, and there are cases where that court has been called on to exercise the same power now before this court. *Resolution* 102 of 1793.

APPEAL DISMISSED.

Negro John and others vs. Morton.—1836.

NEGRO JOHN, AND OTHERS vs. WILLIAM MORTON, *Adm'r*
of JAMES CLAGETT.—December, 1836.

Upon a petition for freedom, the petitioners to establish their right thereto, offered to prove, the due execution of a paper, purporting to be the last will and testament of their former owner, by which they claim to be manumitted. But it appearing that the same paper had been exhibited in the Orphans court for probate, and probate refused, upon a caveat being filed thereto by the next of kin, the county court rejected the evidence as inadmissible, and this court, upon appeal, affirmed the judgment.

A will of personal estate, which the Orphans court has refused to admit to probate, cannot afterwards be proved in the county court,

APPEAL from *Montgomery* county court.

This was a petition for freedom by the appellants, filed on the 1st of December, 1835, against the appellee, and was submitted to the county court on the following statement of facts.

In this case, it is agreed, that *James Clagett*, of *Montgomery* county, in the state of *Maryland*, against whose administrator this petition is filed, died in the said county, some time in the year 1834. That he left a paper writing, signed by him, in the shape and form of a testament and last will. That the said paper writing was filed in the Orphans court of the said county, shortly after the death of the said *Clagett*, and there propounded for probate. That the next of kin of the said *Clagett*, filed a *caveat* in said Orphans court, against the said paper writing being admitted to probate, as the last will and testament of the said *Clagett*, alleging that the said *James Clagett* was, at the time the said paper writing was executed by him, of an unsound mind, and incapable of making a reasonable disposition of his estate. That the said Orphans court having appointed a day for that purpose, heard testimony, and the argument of counsel, in support of, and against the validity of the said will, on the allegations in the said *caveat* contained, and after consideration decreed, that the said *James Clagett* was of unsound mind, and incapable of making a reasonable disposition of his estate, by last will and testament, at the date of the said paper writing,

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and refused to admit the same to probate. That the said judgment of the said Orphans court remains unreversed, and unappealed from, and of full force in the said court. That the said *James Clagett*, in and by the said paper writing, purporting to be his last will and testament, disposed of his estate, real and personal, and among other clauses was the following, to wit: "I give full power to my executors, and I direct them immediately after my decease, to manumit and release from slavery my two negro men, *Robert* and *Aaron*, to whom I hereby give the use and quiet possession, rent free, of my tenement and garden in *Georgetown*, late in the possession and occupancy of *Mrs. Rabbitt*, to hold and continue such use and possession for their joint lives, and the life of the survivor of them."

"I direct my executors, immediately after my decease, to manumit and release from slavery, after well-clothing them, my four negro women, *Mary*, *Phæbe*, *Sophia*, and *Elizabeth*, and all their increase, which increase shall be so specially manumitted as to belong to their mothers, the boys to the age of twenty-one years, and being girls to the age of sixteen years; and I declare, that all the said negroes may remain on my farm, and be supported out of my estate, they working thereon as usual, until the said farm shall be sold, and I direct my executors, when the said negroes shall depart from my farm in consequence of its being sold, to give and deliver unto *Mary* and *Phæbe*, in consideration of their numerous offspring, three barrels of corn, and one hundred pounds of meat, or a milch cow a-piece, at their option."

"I direct my executors, after making sale of my farm, whereon I reside, and after conveying and giving possession thereof to the purchaser thereof, without any delay, to manumit and release from slavery, (after well-clothing them,) all and every of my other slaves, except only my negro man, named *Harry*, a shoemaker, now in the service of *Jesse Leach*, which said *Harry* is to be taken as a part of the residue of my estate. My will and desire is, and I do hereby will and direct, that my male slaves shall be manumitted and dis-

charged from slavery upon this condition, that they make comfortable and ample provision for old *Phæbe* during her life."

It is understood and agreed, that nothing herein contained shall be taken to be an admission on the part of the defendant, that the said paper writing was executed by the said *James Clagett*, as his last will and testament, but only that such paper writing was exhibited for probate as aforesaid, and the same being now presented to this court by the petitioners, who offer to prove the execution thereof by witnesses before this court, the defendant objects to the admissibility of the same as evidence in this cause.

1. Because the said writing never has been admitted to probate in any court having jurisdiction of the probate of wills.

2. Because the judgment of the Orphans court of *Montgomery* county aforesaid, in the said *caveat*, refusing to admit the said writing to probate, is conclusive and binding on this court, the same remaining of full force and unreversed.

3. Because the Orphans court aforesaid, have exclusive jurisdiction in matters relating to the probate of wills; and the proceeding and judgment of the said court aforesaid, being *in rem*, is binding and conclusive on all persons whatsoever, claiming any right or interest under the same.

The facts set forth in the preceding statement are agreed to be true, with liberty to either party to appeal in the same manner as if a special verdict had been rendered, and the judgment of the court given thereon.

If the opinion of the court shall be in favour of the petitioners, judgment shall be so entered; if otherwise, judgment shall be entered for defendant, and the petition dismissed, with liberty of appeal as aforesaid.

The county court (*Dorsey, Ch. J.* and *Kilgour and Wilkinson, A. J.*) gave judgment against the petitioners, whereupon they prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER, and CHAMBERS, Judges.

R. J. BOWIE and R. JOHNSON, for the appellants.

This case comes before this court upon an agreement of facts, and the only question which seems to have been presented to the county court, and to be before this court is, whether it was competent to the petitioners to establish, by proof, in this cause the valid execution of a paper, purporting to be the last will and testament of *James Clagett*, the appellee's intestate, and former owner of the petitioners, by which the petitioners were manumitted, said paper having been before the Orphans court of *Montgomery* county, for probate, and on *caveat* by the next of kin of *Clagett*, that court having refused to admit it to probate, because of the mental incapacity of the supposed testator, and their judgment not having been appealed from, or set aside.

The counsel of the appellants will contend: That such judgment is not *conclusive* on the petitioners, and that it is competent for them, notwithstanding the same, to establish the will by proof, in the present case.

J. JOHNSON, for the appellee, contended:

1. That the petitioners could claim no right under the will, prior to its being admitted to probate in the Orphans court.

The act of 1798, *ch.* 101, *sub. ch.* 2, confers upon the Orphans courts, exclusive jurisdiction to try the validity of wills of personal estate.

By the 4th section, the probate is made conclusive, if the will is admitted to probate.

The 11th section makes the judgment of the Orphans court equally conclusive, if the decision is against the will. And the 13th section allows the Orphans court to re-hear the case after probate, either before or after the grant of letters, and makes the decision final, unless reversed on appeal to the Chancery or general court.

The act of 1818, *ch.* 204, sections 1 and 2, give an appeal to the court of Appeals, or by agreement to the county court.

Our Orphans courts have the same jurisdiction in reference to wills of personal estate, as the Ecclesiastical courts of *England*, and the validity of such wills can only be decided in those courts.

They only can pronounce such a will good or bad, to the utter exclusion of the courts of common law. 1 *Williams' Ex'rs*, 157, 158. *Allen vs. Dundas*, 3 *Term Rep.* 64. *Armstrong vs. Lear*, 12 *Wheat.* 175. In questions affecting personal estate, nothing but the probate or letters, with the will annexed, are evidence. *King vs. Inhabitants of Netherseal*, 4 *Term*, 150.

The attempt in this case was, to substitute the county court for the Orphans court, and if that course is allowable, the testacy, or intestacy of a party, will be made to depend upon the fluctuating opinions of every jury, which may be called upon to decide the question; as it is impossible to say, that the verdict of one jury would be binding upon another, in a case involving other questions, and between other parties.

The question of the validity or invalidity of the same will would be perpetually recurring, and conflicting decisions constantly made.

This jury might have found the will good, and the Orphans court bad, or *vice versa*.

2. If however, independently of any decision by the Orphans court upon the subject, it would have been competent to the petitioners, to prove it in the county court, the judgment of the former court having been pronounced against the will is final and conclusive.

The 11th and 13th sections of the *second sub. ch.* of the act of 1798, *ch.* 101, make the decision of the Orphans court conclusive if against the will, unless reversed on appeal. And the 4th section declares, that the will shall not be contested after probate.

It is clear, that if the Orphans court, upon the *caveat*, had

decided in favour of the will, it would not have been in the power of the defendant to have contested it upon this petition, and the same conclusive effect must result from a decision against the will.

The attempt is, to confer upon the county court appellate jurisdiction over decisions of the Orphans court, incidentally and collaterally, notwithstanding the act of 1818, *ch.* 204, declares in terms, that a *direct* appeal can only be taken to that court by the written agreement of the parties. And the appeal so to be taken, the same act says, shall be taken within thirty days from the date of the order or decree appealed from, which provision, it is obvious, if the present proceeding prevails, will be wholly nugatory, as the question involved in such order or decree, will be constantly coming up, without limit as to time.

Again—the county courts, even when the parties agree to take the appeal to them, are only authorized to review the decisions of the Orphans courts when they have before them a transcript of their proceedings. *Sub. ch.* 2, *sec.* 11.

But here there is no such transcript, and consequently the county court is asked to do indirectly, what it could not do directly. It is asked to review the judgment of the Orphans court incidentally, without regard, either to the time and mode of prosecuting a direct appeal from its decision.

The authorities are conclusive upon the binding effect of the judgment of a court of competent jurisdiction, when coming up incidentally in another court. *Barney vs. Patterson*, 6 *Har. and John*. 201. *Gelsten vs. Hoyt*, 4 *Peters' Cond. Rep.* 261. This however is not only the judgment of a court of competent, but of *exclusive jurisdiction*. 1 *Williams' Ex'rs*, 158. In an action by an executor, the probate is conclusive of his right to the estate. *Raborg vs. Hammond*, 2 *Har. and Gill*, 49. Proof of forgery, even in the temporal courts, will not be received to impeach the probate of a will. *Allen vs. Dundas*, 3 *Term Rep.* 60. It is true, the authority of the executor, is derived from the will, but the *evidence* of that authority, is to be found in the probate

alone, in cases respecting the personalty. 1 *Williams' Ex'rs*, 159. *Armstrong vs. Lear*, 12 *Wheat. Rep.* 169. *Tucker vs. Philips*, 3 *Atk.* 360. The nature and object of the present proceeding, cannot affect the rules of evidence, as questions affecting freedom are governed by the same rules, as those which relate to the assertion of other rights. *Mina vs. Hepburn*, 7 *Cranch*, 290. 5 *Munford*, 552.

3. There are other inseparable objections to the right of the petitioners to their freedom.

They are not manumitted by the will, but the executor is directed to set them free, and he has no power to execute the will without probate, that being the only *proof* of the will, in regard to the personal estate. *Allen vs. Dundas*, 3 *Term*, 65. *King vs. Netherseal*, 4 *Ib.* 150. 1 *Williams' Ex'rs*, 159. The executor, to be sure, derives his authority from the will, but the question is, *is there a will*, and that can only be settled by the probate.

Having to deduce their title from the executor, they must shew him to be such, by producing the probate. 1 *Williams' Ex'rs*, 161.

But suppose this objection obviated, and the executor could be shewn competent to manumit without probate, there is no evidence *that he has exerted* the power, and therefore the petitioners must fail.

By the court, ARCHER, Judge, dissenting.

JUDGMENT AFFIRMED.

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AMOS CLARY AND HENRY CLARY vs. JACOB FRAYER.
June, 1837.

A bill of sale of personal property, duly executed, acknowledged and recorded, is as valid and effectual to pass the legal title to the vendee, as if there was an actual delivery of the property transferred.

The vendee in such case is clothed with the constructive possession, and is legally competent to convey it to any third person.

The enrolment is a substitute for, and takes the place of actual delivery, and repels all those imputations of fraud, which would arise from the retention of possession by the grantor.

J. E. being the owner of a horse and other articles of personalty, by bill of sale, dated 23d January, 1833, and duly executed, acknowledged and recorded, conveyed the same to W: the vendor retaining the possession. W. on the 31st December of the same year, by assignment, endorsed on the instrument, transferred for a valuable consideration which was paid, all his right and title to the property therein mentioned to A. and H. which assignment was also acknowledged before a justice of the peace; and on the same day, went to the house of J. E. where the property, except the horse then was, and delivered several of the articles to A. and H. saying to them, "you will surely get the said black horse—go and get him wherever he may be." *Held* to be sufficient to pass the property to A. and H. the plaintiffs, and to enable them to support *replevin*, against a party who claimed under a subsequent sale, made under execution against the original vendor.

APPEAL from *Frederick* county court.

This was an action of *replevin* for a black horse called "*Figure*," commenced on the 10th January, 1834, by the appellants against the appellee. Issues were joined on the pleas of *non cepit*—property in the defendant, and not in the plaintiffs.

At the trial the plaintiffs proved that the horse was raised by their father, *John E. Clary*, and then proved a bill of sale, dated 23d January, 1833, from him, duly executed, acknowledged, and recorded, for various articles of personal property including the horse replevied, to a certain *William H. Poole*, on which was written and proved, the following

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endorsement—"December 31st, 1833, for value received, I do hereby assign all my right and title to the property named in the within bill of sale to *Amos and Henry Clary*, and have sold all my right to said property to them.

WILLIAM H. POOLE."

This transfer was also acknowledged before a justice of the peace. The plaintiffs then proved that on the 31st December, 1833, the said *Poole* went with them to the house of the said *John E. Clary*, where the property in the said bill of sale specified was, except the black horse *Figure*, which said horse was then absent from the said house, and premises of said *John E. Clary*, in possession of said *John E. Clary*, who had rode said horse from home; that said *Poole* bargained and contracted with the plaintiffs to sell, and did sell them all the property in said bill of sale mentioned, so far as the same remained; the said black horse and several other articles were then so remaining and undisposed of, for the same consideration, a sum of money in said bill of sale mentioned, and which was then paid by the said plaintiffs to the said *Poole*; that the said *Poole* then delivered to the said plaintiffs several of the articles of property mentioned in said bill of sale, and told the said plaintiffs, "you will surely get the said black horse—go and get him wherever he may be;" that the said plaintiffs then took possession of the said other articles of property mentioned in said bill of sale, so far as the same remained, and actually sold a part of them, and retained the other part; the said plaintiffs went the day afterwards to find the said black horse, and found that he was in the possession of a *Mr. Chaney*, who refused to deliver him to the said plaintiffs; that afterwards said *Chaney* offered said black horse for sale, and the said defendant then became the purchaser, the plaintiffs telling said defendant before he bought, that they had bought said black horse from *Poole*.

The defendant then proved that from the date of said bill of sale up to the 31st December, 1833, the said *John E. Clary* remained in the actual possession of all said property

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in said bill of sale specified, and sold a part thereof and used other parts thereof; and that previous to the time when said *Poole* came to the house of said *John E. Clary* as aforesaid, the said *John* had gone away with the said horse and did not return until several days afterwards, and then returned without said horse, and that while thus absent the said horse was levied upon by said *Chaney*, a constable, as the property of said *John E. Clary* under a *fieri facias*, and sold publicly under the writ, to the defendant, who paid the purchase money and received the horse; that the proceedings against *Clary* was regular and duly executed.

The plaintiffs prayed the court to instruct the jury, that if they believed the evidence, it was a sufficient proof of a sale and delivery of the said black horse by *Poole* to the said plaintiffs, to entitle them to recover in the action; which instruction the court, (*J. Buchanan, Ch. J. and T. Buchanan, J.*) refused to give. The plaintiffs excepted, and the verdict and judgment being against them, they brought the cause by appeal to this court.

It was submitted on written arguments to STEPHEN, ARCHER, DORSEY, and CHAMBERS, Judges.

BREngle, for the appellants.

1. The contract of sale was not a transfer of an equitable right; it transferred, and was intended to transfer the thing itself, the horse in controversy. What equitable right is it pretended was transferred? How enforced? It would be difficult to designate the appellants' right, if more equitable and still more difficult to point out the way of reaching or enforcing it. It was intended to give the appellants a legal right, a right of property in the horse, and a right to the immediate possession of him, and this intent is clearly manifest from the language of the *whole* contract, and the very nature of the transaction, and its subject matter. What else could the parties have intended? The appellants took actual possession of the chattels sold, except the *black horse*, and again sold them; this was intended by the parties to the con-

tract, and what was intended in reference to these chattels, was intended in reference to the *black horse*.

2. Could *Poole* make this contract? *Poole* was the absolute owner of the horse, and had not only a mere *chose in action*; there was no adversary claim by *John E. Clary*, he had, to be sure, the actual possession, but this by permission and assent of *Poole*, determinable by the mere will of *Poole*; suppose A. had injured the said horse while in the possession of *John E. Clary*, *Poole* might have brought trespass, *vi et armis*. *John E. Clary* had no right to the possession, to use the thing, he had the occupation of it only. 1 *Chitty Plea*. 154, margin. 2 *Camp*. 465. If there had been a right to possession in *John E. Clary*, for a time, and not controllable by *Poole*, then *Poole* would have had no right to bring an action of trespass, *vi et armis*. If the appellants had not the right to demand immediate possession after sale, let me ask who could demand possession? *Poole* could not, obviously, he had parted with every thing, call it by what name you may, he then had neither right of property nor right of possession, and yet it will not be pretended that a right of immediate possession to the horse became extinguished by the sale, or that such right thereby was created in *John E. Clary*, it follows then, that this right was in the appellants. If they had the property in the thing, and a right to demand possession, they are entitled to recover. *Cullum vs. Bevans*, 6 *Har. and John*. 469, &c. See also *Baker and others vs. Fale*, 16 *Massa*. 147.

3. To their possession it is sufficient to say, that there was a delivery of the property; there was actual and bodily delivery of part, with direction to take the other; this is a delivery.

4. There was no question of fraud in the case, this was not pretended—the whole was a question of the right to maintain this action by the appellants, they never having possession, &c. it might as well be now contended, that the jury were precluded from finding a previous sale of the horse to A. Fraud cannot be presumed, &c. In this case, as set

forth in the record, and which is the whole case, the prayer does not invade the province of the jury; it left the facts in the cause wholly with the jury, whilst it asks the court's opinion on the law thereon.

5. It is not necessary to prove taking, &c.—it is enough to have a right to demand possession of property. 6 *Har. and John*. 469.

W. SCHLEY, for the appellee.

The prayer, which was offered by the plaintiffs' counsel, affirmed, as *a conclusion of law* upon the facts, (supposing all the testimony to be accredited by the jury,) that there was "sufficient proof of a sale and delivery of the horse by *Poole* to the plaintiffs, to entitle the plaintiffs to recover in this action." The court refused to give the instruction asked for; and to that *refusal*, the plaintiffs excepted.

If the instruction asked for was not demandable, *as a legal right*, and *to the extent claimed*, the court below was bound to refuse it. The court below, however, was not bound to give any qualified instruction upon a specific prayer, demanding instruction in terms. It was open to the plaintiffs to offer any other prayers, which his counsel might think it advisable to make.

The only question, then, to be discussed here is, "was there *sufficient proof* of a sale and delivery &c. *to entitle the plaintiffs to recover?*"

There was no delivery, in fact, by *Poole* to the plaintiffs; nor did the plaintiffs ever obtain actual possession of the horse, until after the commencement of this suit. The prayer assumes that this was unnecessary.

It is equally certain that *Poole* never had the actual possession of the horse. His title was by virtue of a bill of sale, dated 23d January, 1833, duly executed, acknowledged and recorded. The property remained in the possession of the vendor, *John E. Clary*; and the horse in controversy was levied upon, as his property, at the suit of his creditors, on the 1st of January, 1834. The plaintiffs claim title to the

horse, under a purchase made, on the day preceding, (viz. 31st December, 1833,) from *Poole*. The contract is as follows, "December 31st, 1833. For value received, I do hereby assign all my *right and title* to the property named in the within bill of sale, to *Amos and Henry Clary*, and have sold all my *right* to said property to them.

WILLIAM H. POOLE."

1. My first position is, that *Poole*, by this contract, only meant to transfer, and has only in fact transferred his *interest* in the *bill of sale*; and his *right*, by force thereof, that is, *under the bill of sale*, to the plaintiffs.

The bill of sale is a mere muniment of title; and the assignment thereof, would give the assignees a mere equitable right; not a legal title. If it be an assignment of his *right* under the bill of sale, and not a substantive of the property, then, *even if the assignment had been under seal, and had been recorded*, it would not clothe the assignees with a legal right, so as to enable them, in a court of law, to bring an action to recover possession of the property.

In all sales of personal property there is an implied warranty of title, and an obligation to deliver. In this case, the assignment is general of his right and title to *all* the property. In point of fact, the vendor had used much of this property, and had sold part:—can it be pretended, that under the contract, signed by *Poole*, he is answerable to the assignees, for what was so used and sold? I suppose not. He meant merely to transfer his *right* to the property; not to sell the specific chattels. The contract will not bear any other interpretation, without, as it seems to me, disregarding the intention of the parties as carefully expressed.

2. My second position is, that even if *Poole* had intended to make a substantive sale of the horse, he was not in a predicament to do so. The horse was in the actual possession of another; and *Poole's* right was a mere *chose in action*. He had the right of property under his absolute bill of sale; he had the immediate right of possession, and could himself

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have maintained *replevin*: but he had not the possession of the horse, and was not in a situation to deliver him.

Now I admit, in the fullest manner, the efficacy of the bill of sale, to transfer the property from *John E. Clary* to *Poole*. Notwithstanding that the vendor retained possession, the same interest is transferred by this bill of sale, under the act of 1729, as if possession, in fact, had accompanied the transfer of the right. But the right of property, when unaccompanied by possession, actual or constructive, is a mere *chose in action*; so an immediate right of possession, without more, is a mere *chose in action*. “*A chose or thing in action* is contra-distinguished from a chose or thing in possession. If it be not in *possession*, it must be *in action*; and so *vice versa*.”

Now supposing the right of property in the horse, to be a mere *chose in action* in *Poole*, it is very clear that this right cannot be assigned, so as to entitle the assignee to *sue in his own name* in a court of law. *Co. Litt.* 214, a, 266, a, 2 *Rolls. Abr.* 45, 46. *Master vs. Miller*, 4 *T. R.* 340. As to the effect of the assignment in equity, and the efficacy there of notice to the defendant, it is unnecessary to inquire, as we are now in a court of law.

If the possession of *John E. Clary*, was an adversary possession, there could be no doubt. The case of *Stogdel vs. Fugate*, 2 *Marsh. Rep.* 136, is an express authority in such a case. In that case there was direct proof, that at the time of the sale of the chattels in controversy, they were in the possession of another, who claimed absolute dominion over them. In this case there is no such proof; and I admit that if the possession of *John E. Clary* is the possession of *Poole*, then the horse was a *chose* in possession of *Poole*, and not a mere *chose in action*. Now I say that the act of 1729, does not consider the possession of the mortgagor, donor or vendor, as the possession of the mortgagee, donee or vendee.

It says that *the right of property* shall be transferred, notwithstanding that there is *no change* of possession. I distinguish between an immediate *right of possession* in *Poole*, and a *constructive possession* in *Poole*.

Under the bill of sale, he had the former ; but not possession in fact or in law. The actual possession of *Clary*, the vendor, was not the constructive possession of *Poole*, the vendee. The act of 1729 cannot be construed to work a statutory change of *possession* : it allows a transfer of the *right of property*, notwithstanding that there is no transmutation of possession. It makes the possession of the vendor consistent with the right of property in the vendee. Still the right of the vendee is *necessarily* but a *chose in action*, because not a chose in possession. Although *Poole* then had an immediate *right* of possession, and could sue in his own name ; yet, forasmuch as he had not *possession* of the horse, he could not, by a sale of his right of property, transfer to his vendee this right of action.

Thus far I have considered the point, without regard to whether *John E. Clary* held adversely or not. Virtually I have conceded for the argument, that he did not make any claim to the property himself. But am I bound to do so ? It is not proved that he did hold adversely ; but *non constat*, that he did not so hold. The evidence is, that when *Poole* and the plaintiffs went together to *John E. Clary's* house, "the black horse was absent from the said house and premises of the said *John E. Clary*, in the possession of the said *John E. Clary*, who had rode said horse from home." It is worthy of remark, too, that when *Poole* and the plaintiffs had made their contract, *Poole* said "you will surely get the black horse ; go and get him wherever he may be." It was also proved that from the date of the bill of sale, up to the time of the assignment of the bill of sale, that "the said *John E. Clary* remained in the actual possession of all said property, and sold part thereof, and used other part thereof." The horse was also put in the stable of the innkeeper, by *John E. Clary* ; and this the day after the assignment, and he went off with the horse, on the very day, perhaps, that the plaintiffs and *Poole* came to his house. Now might not the jury have reasonably inferred from all these facts, this user and disposal of part of the property, and the carrying away

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of the horse, under the circumstances, that *John E. Clary* claimed some right in this horse? But if the instruction had been given, as prayed, this point would not have been open for discussion. It would have trenched upon the province of the jury.

3. My third position is, that even if *Poole* had constructive possession of the horse, the sale by him made, (being unaccompanied with delivery of possession, and not being by writing, duly executed, acknowledged and *recorded*,) did not, as against this defendant, transfer to the plaintiffs a right of property in the horse.

It is very true that the defendant is not a creditor of *Poole*; nor does he claim under the creditors of *Poole*. The position is, that a sale of personal property, in this state, where the vendor retains possession, although good *inter partes*, and good against persons claiming by, from or under the vendor, his executors, &c. is void, as against third persons. It is very true that in the several cases upon the act of 1729, the judges speak of creditors, &c. as if the sale was good against all persons, *except* creditors of the vendors. But the question now proposed is not made in any of the cases, nor is it decided in any of them, nor intended so to be. The court are requested to look at the 5th and 6th sections of the act of 1729, ch. 8, and then to decide whether a sale by a person, who retains the possession of the chattel, transfers any property to the vendee, as against third persons, not privies, except where there is a bill of sale, duly executed, acknowledged and recorded.

This proposition concedes for the argument, that the possession of *John E. Clary* is the possession of *Poole*; and that *Poole* had the horse as a *chose* in possession, and not in action. And it assumes that the sale, by such an instrument as *Poole* executed and acknowledged, (but which was never recorded,) unaccompanied by delivery, did not, as against this defendant, transfer the property to the plaintiffs. The statute of *Elizabeth* (13 *Eliz. Cap. 5*.) is confined, in its protection to creditors, by express limitation—"only as

against that person or persons, &c. whose actions, &c. shall be hindered, &c. &c.” but there is no such limitation in the 5th section of the act of 1729. It is general; and the 6th section only saves such sale, as against the vendor and his privies, but not as against other persons.

I am not aware that this precise point has been heretofore proposed for decision. It is one of great practical interest.

4. If the court had granted this prayer, in the terms in which the instruction was demanded, it would have precluded the defendant from impeaching the bill of sale, from *Clary* to *Poole*. The defendant claims, under the creditors of *Clary*, as a purchaser at a sale under executions against *Clary's* property. Now if the bill of sale was fraudulent, as against *Clary's* creditors, then *Poole* had no title, and he could transfer no right to the plaintiffs. Now there could not be “*sufficient evidence* of a sale and delivery, by *Poole* to the plaintiffs, to entitle the plaintiffs to recover,” unless *Poole* had a good title, under the bill of sale from *Clary*.

It is very true that fraud is not to be presumed, but it may be inferred from facts and circumstances, &c. &c. The retainer of possession would not, *per se*, make the bill of sale void. The act of 1729 sanctions this. But it is a fact, with other facts and circumstances—such as the length of time during which *Poole* slumbered on his right;—the user of the property;—the consumption of a part, and the sale of other part; the generality of the conveyance, comprehending all the party's property;—the apparent inadequacy of the price;—the suspicious circumstance of superadding the formality of the delivery of a spoon, &c.—all together, from which the jury might possibly have inferred fraud. It is sufficient objection to the prayer, that it asked an instruction which would have invaded the province of the jury.

5. The prayer went to the extent of asking an instruction, that there was sufficient evidence, &c. *to entitle the plaintiffs to recover in this action.*

Now there was a plea of *non cepit*, and it is very plain that the plaintiffs were bound to shew, upon the issue joined

upon the replication to that plea, that the defendant had possession, at the time of the commencement of this suit. There is no such proof in the cause. The only proof is, that the defendant *purchased* at the constable's sale; not that he took the horse away. We have the fact, that the sheriff *replevied* the horse from the defendant's possession, but *non constat*, that he had him in possession at the time of the writ issued. The *execution* of the writ must have been *after* the issuing of the writ; and possession at that time does not prove, conclusively, that he had possession before.

The questions here submitted, do not depend upon the statute of frauds, nor upon the *Statute of Elizabeth*. They depend, in part, upon the common law; and the third one upon the construction of the act of 1729, *ch.* 8.

ALEXANDER, for appellants :

In reply to the argument in writing filed by the counsel for the appellee, the appellants' counsel would ask leave to submit the following remarks :

John E. Clary was the once undoubted owner of the horse which is the subject of this suit. He sold the horse to *Poole* for a valuable consideration, and by a deed, or bill of sale, duly executed, acknowledged and recorded. *Poole* then sold to the appellants. The appellee claims under a sale made in virtue of sundry executions against *John E. Clary*. And the question is whether the appellants or the appellee have the better title? The appellants are plaintiffs below, and must show their better rights.

Upon the evidence offered, the plaintiffs below prayed the court to instruct the jury that there was sufficient evidence (if it was believed by the jury) of a delivery by *Poole* to the plaintiffs, to entitle them to recover in this action—that is to say, for the purposes of this suit. The court refused this prayer, and the question is whether the court below was right or wrong in this refusal?

The plaintiffs did not ask the court to instruct the jury that the plaintiffs on the evidence were entitled to recover,

nor that if the jury found there was a delivery from *Poole* to the plaintiffs, the latter would in this event be entitled to a verdict. No such general or comprehensive instruction was asked. Evidence having been offered on both sides of the character of *Poole's* title, upon which a question might have been, and probably was raised before the jury, as to the sufficiency of the delivery by *Poole* to the plaintiffs, the court was asked to instruct the jury in regard to the legal effect of that evidence. This is the point raised by the prayer, and this is the point which was decided by the court.

It is said the court is not bound to give an instruction unless the party has a right to demand it. This is not denied. But will it be pretended that the plaintiffs were not entitled to ask of the court an instruction whether the right of *Poole* in the property was such as was susceptible of a sale and transfer under the circumstances stated? Nor will it be denied that a court may, if it pleases to be despotic, reject a prayer because it is somewhat too broad or exceptionable in its terms. And yet, every one must admit that a judge would sadly forget the duties of his office who should reject a prayer which had substantial merits because of some inadvertent inaccuracy in its language—and more especially, if he should content himself with a simple denial without suggesting the trivial defect which was capable of remedy. If a judge will act in this capricious manner I will not say that this court can or ought to relieve the injured party from the consequences. Yet I may say that this court will always presume that the judge below has fairly met the question which was fairly presented to him, and will as far as practicable adopt such construction of the prayer and the instruction, as will make the one a response to the other, and as will bring up for review the question which was really decided below.

Now no one can doubt as to the intention with which this prayer was submitted. Either it intended to assume that the plaintiffs' right to recover depended on the simple question, whether there had been a sufficient delivery by *Poole* to the

plaintiffs, or it intended to leave every question open, excepting the legal sufficiency of the evidence of delivery. Is there any thing to shew that the plaintiffs intended to make the case turn upon the question of delivery? If there is not, it must follow that every question, save that of delivery, was intended to be unaffected by the instruction.

It is to be assumed then that the prayer is unexceptionable in its form, and the question is, whether there was sufficient evidence of delivery to pass the title to the plaintiffs?

1. The first objection is that *Poole* intended to transfer, and in fact did transfer his right or interest in the bill of sale merely as a minument of title, and therefore has conferred on the plaintiffs only an equitable title.

Now, if it be meant that *Poole* has transferred nothing more than the paper or parchment on which the bill of sale is written, then the plaintiffs will not have acquired even an equitable title to the property.

But if it be conceded that he intended to convey any right to, or interest in the property, it will be very difficult to show that he did not intend to convey such *right* as he had and legally could convey. If he had a *legal* title to the property, and that legal title was capable of transfer, there will be little doubt of the legal efficacy of his act.

This first point rests entirely on the gratuitous assumption that the written assignment furnishes the only evidence of the agreement or contract for sale. But we have shown the contract itself consummated by the payment of the price, on one part, and the delivery of every article but the horse on the other. And the written assignment is merely as evidence of the assignment. Will it be said that *Poole* did not intend to transfer all his right, as well at law as in equity, to all the property which was delivered? And will it be gravely argued that his intentions in regard to the horse were different from his intentions in regard to the other property?

2. It is then denied that *Poole* was in a predicament to make a substantive sale of the horse—and it is argued that

at the time of sale, *Poole's* interest was a right in action, because the *actual* possession was in another.

It is admitted by the counsel for the appellee, that “notwithstanding the vendor (*John E. Clary*) retained possession, the same *interest* was transferred by this bill of sale under the act of 1729, as if possession in fact had accompanied the transfer of the right.” And it is also distinctly admitted that *Poole* “could himself have maintained *replevin*,” in virtue of the right which he had acquired under his absolute bill of sale. But if *Poole* had been in the *actual possession* of the horse at the time of his sale to the plaintiffs and delivered the residue of the property, we submit that no question could arise as to the validity of the transfer of this horse by that sale. The sale may be executed and the transfer completed by payment of the whole or a part of the purchase money, or of earnest or by delivery of a part of the property. Admitting then that the horse was in actual possession of *Poole*, enough was done to transfer the right to the plaintiffs. And if upon a sale by a person in possession, and upon payment of the purchase money and delivery of a part, the vendee may maintain *replevin* for the residue, it will be found that no subject or question will remain for controversy here.

The fallacy of the argument on the other side consists, in supposing that *Poole* had acquired from *John E. Clary* nothing more than a *right* or *chose in action*. He is right in distinguishing between a *chose in action* and a *chose in possession*. We are also willing to admit that if a *chose* be not in *possession* it must be *in action*. And further, that if the right of property be not accompanied by possession, *actual* or *constructive*, it is a right or *chose in action*. But it has been yielded by the counsel for the other side that *Poole* acquired the same right or interest by his recorded bill of sale “as if the possession in fact had accompanied the transfer,” or in other words as if actual possession had been delivered to him. *Poole* then acquired a *constructive possession*, that is a possession by construction or intendment of law—placing him in the same predicament with regard to

his legal rights and remedies, as if he had acquired the actual possession. And therefore by the learned counsel's own shewing, he acquired, and at the time of his sale to the plaintiffs, had something more than a mere *right* or *chose in action*.

Instead of discussing the right of *Poole* to transfer to others a legal right of action, we will endeavour to show that the learned counsel has done right in conceding, that a thing in *possession constructively* differs from a thing *in action*.

An action of *replevin* sounds in *tort*, and is therefore an action of trespass—and the plaintiff may recover indifferently in *replevin* or in *trespass*, commonly so called, upon the same proof of title. In 2 *Stark. Ev.* 805, it is laid down that “in an action for trespass to a personal chattel, the plaintiff may either show *actual* possession, or prove his *title in law* to the possession: for in construction of law the right of property draws after it the possession. And he may, therefore, “show a legal right to the chattel vested in him, although he has never had the actual possession.”

In 1 *Chitty's pleadings*, 167, it is said that the plaintiff in trespass must have “an *actual* or *constructive* possession, and also a general or qualified property therein which may be either in the case of an absolute or general owner *entitled to immediate possession*,” &c. &c. *Poole* then, by his bill of sale acquired a *constructive* possession, which in reference to his rights and remedies is tantamount to an *actual* possession. He was therefore capable of transferring a legal title to his vendees—and they can maintain the same action for recovery of their property as if *Poole* at the time of their purchase had been in *actual* possession.

In a subsequent part of his argument, page 5, the learned counsel distinctly admits, that if the possession of *Clary* is the possession of *Poole*, then the horse was a *chose* in possession of *Poole* and not a *chose in action*. But he argues that the act of 1729 does not consider the possession of the vendor as the possession of the vendee.

It is submitted that at common law, and under the statute

of frauds, the property is transferred by payment of the purchase money, and the actual possession of the vendor is by that event changed into the constructive possession of the vendee. The act of 1729, does not interrupt these consequences. But merely provides that the *constructive* possession of the vendee shall not prevail against the creditors of the vendor, who is permitted to remain in actual possession, unless the evidence of right be placed on record.

There may be a right of possession in one, as opposed to the actual possession wrongfully acquired by another. But as between a vendor and vendee there can be no such thing as an *immediate right of possession* as could be distinguished from a *constructive possession*. This may be shown by a single case. A, in possession, sells to B. C then takes the goods out of the actual possession of A. By whom is the action for the recovery of these goods to be brought? If B acquired the possession by construction of law, then the wrong was done to him, and he may have his action. But if he acquired nothing more than an immediate right of possession, then the action must be brought by A; unless it be contended that a *trespass* can be committed against a *chose in action*. It is submitted that all the authorities prove the action may be brought by B.

It is supposed in the argument of the other side, that if *John E. Clary's* possession was adverse, the case would be clear of doubt. We need not controvert this position, as it would be impossible to show that *Clary's* possession was adverse. *Clary* did not hold adversely. The evidence is not offered to show an adverse holding, and if it had been so offered the instruction prayed for if given, would have been right, as it only charged that the jury from the evidence might or might not find a delivery.

3. The third argument is, that if *Poole* had constructive possession, his sale transferred no right to the plaintiffs, as possession did not accompany the sale, and his assignment was not recorded. The principle of this objection is, that *delivery of possession* or a *deed recorded*, is essential to the

validity of a sale of personalty as against all persons but the vendor and his representatives—and it is attempted to derive this principle from the act of 1729, ch. 8.

It has always been supposed that this act avoided conveyances or sales in favour of creditors and subsequent purchasers only, and continued them in force against the vendors and all others except creditors and purchasers. The act had for its object the protection of those classes, and the remedy has been extended so far as was necessary to attain that object and no further.

At common law a sale was good if made by *parol*, and the right was bound as against all the world by payment of the purchase money. It is true that retaining the possession by the vendor was always a *badge* of fraud—but it did not *per se* vitiate the sale even as against creditors, as is evident from *Twyne's* case. The plaintiffs then acquired a good title at common law. They acquired a good title under the statute of frauds. Is that title affected by the act of 1729? It is not, because that act was passed for the protection of creditors and purchasers, and the defendant cannot assume either character.

It is supposed that this question is unaffected by decisions. But the learned counsel is in error. In *Hudson vs. Warner & Vance*, 2 Har. and Gill, 415: The first deed to *Warner & Vance* was void for want of recording. The second deed to *Hudson* was for valuable consideration, and perfect in all its parts, and accompanied by delivery of possession. Yet *Hudson* was postponed to *Warner & Vance*, because he took, with notice of their claim. Upon the principle now contended for their title was good for nothing. For it cannot be pretended that *Hudson* stood in a worse predicament than a *mala fide* or tortious possessor. The court of Appeals evidently considered, that the title of the first purchasers was good as against all but creditors and *bona fide* purchasers for valuable consideration and without notice.

4. It is next supposed that the instruction, if given, would have precluded the plaintiff from impeaching the sale from

Clary to Poole. The first answer to this objection is, that no effort was made to impeach that sale. It is apparent that the proofs were offered to raise a question as to the competency of *Poole* to sell to the plaintiffs, on the assumed hypothesis that the sale from *Clary* to him was good. It is conceded that fraud may be inferred from circumstances—nor is it material to deny that fraud might be inferred from the circumstances proved in this case, if the proofs had been offered for that purpose. But the proofs were not offered for that purpose. And as fraud is not to be presumed, it may be fairly argued that the court will not presume that the party intended to raise a question of fraud, on evidence which is apparently offered for a very different purpose. Why did he not say that he intended to charge the parties with fraud?

But the prayer has no such effect as is alleged—it merely asks an instruction that the jury *may infer*, &c. and if it be admitted that the jury, from the evidence, might have found *there was fraud*, it must also be conceded to us that the jury were also at liberty to find *there was not fraud*.

5. It is then objected that the plaintiff did not offer sufficient evidence of a taking to entitle him to a verdict on the plea of *non cepit*.

We have before remarked that the only question raised, was whether the plaintiffs had offered evidence of a delivery by *Poole* to them. The prayer concluded no other question, and the consequence is, that if the instruction had been granted, the defendant might still have relied on the insufficiency of proof as to the taking.

But there was evidence from which a taking might have been inferred—the defendant was in possession at the service of the writ—a few days after it was issued. When did he acquire possession? He acquired title at a sale made a long time before, by a constable—he was in actual possession at the time, and to whom he paid ready money. Is it not a fair inference that he acquired possession immediately after the sale?

STEPHEN, Judge, delivered the opinion of the court.

The question involved in this case has been argued with considerable ingenuity, by the counsel for the respective parties, and has received the attentive consideration of the court; and upon the most careful examination of the authorities which we have been able to make, we have come to the conclusion, that there is error in the opinion delivered by the court below, and that the same ought to be reversed.

The bill of sale from *John E. Clary* to *Poole*, being executed, acknowledged and recorded, according to law, was valid, and effectual to pass the legal title to him, notwithstanding the actual possession of the property conveyed, did not accompany the transfer of the right. 4 *Har. and John*. 446. The interest which a vendee takes under such a bill of sale, is the same in legal effect and operation, as if there had been an actual delivery of the property transferred. The vendee by the execution, enrolment, and delivery of the deed, is clothed, and invested with the constructive possession of the property, and is legally competent to convey it to any third person, to whom he may think proper to dispose of it. The enrolment is a substitute for, and takes the place of actual delivery, and repels all those imputations of fraud which would arise from the retention of possession by the grantor. Such being the character of the title acquired by *Poole*, the question next arises as to the legal effect and operation of his assignment to the plaintiffs in the court below, and the appellants in this court. His assignment and sale of the property was, it appears, endorsed in writing upon the bill of sale from *Clary* to him; the purchase money was paid, and a part of the property sold was delivered. Such at least was the evidence offered to the jury, upon which the opinion and direction of the court to them, was prayed by the plaintiffs. Not only was there an actual delivery of the property in part, but an ineffectual effort was also made to deliver the horse, the subject matter of the present controversy. This attempt to deliver, which was made by going to the house of *John E.*

Clary, on the day following the execution of the assignment from *Poole* to the plaintiffs, failed of its execution in consequence of the absence of the horse, in the possession of *Clary*, who had then rode him from home. Finding the attempts to make an actual delivery at that time abortive, the plaintiffs were assured that they would certainly get the horse, and were told by *Poole* to go and get him wherever he might be found. Considering the light and transitory nature of personal property, how deeply and extensively it enters in commerce, and how incessantly it circulates from hand to hand, in the ordinary transactions of man with man, less ceremony is required by the law, and more facility is given in the transfer of it, than is observed in the disposition of real estate. In accordance with this view of its character, it is said in *Ross on Vendors*, 34, that in the infinite number of transitions from hand to hand, of which property is susceptible, in the mercantile world, very few sales are perfected by actual delivery of the thing sold; hence it is, that the law recognizes in many instances as valid and effectual, a constructive, instead of an actual delivery, where such a delivery cannot readily or conveniently be made. In this case there was not only a sale, in writing, of the horse, but the purchase money was paid, the property of the chattel was therefore vested in the vendee by the bargain and payment of the purchase money.

In 2 *John. Rep.* 16, *Thompson, Justice*, in delivering the opinion of the court, says: “*Blackstone* in his commentaries lays down the rule generally, that a bargain struck, and payment of the purchase money, vests the property of the chattel in the vendee. To illustrate his rule he puts the case of a horse dying in the possession of the vendor after payment of the consideration, and the loss he says must fall on the vendee. This I apprehend to be the rule in all cases, on the sale of a specific chattel, where the identity of the article cannot be controverted.

The inference of law being, that the vendor is a mere bailee retaining the possession at the request of the vendee.

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The sale is not executed, so as to vest the property in the vendee, without an actual or a presumed delivery, and the latter is to be inferred from circumstances, as where there is a designation of the goods by the vendor to the use of the vendee—marking them, or making them up for delivery—the removing them for the purpose of being delivered, and the like. In support of which doctrine, he refers to 1 *Henry, Black.* 363. In the same case, he says, “In the present case there is no controversy respecting the identity or designation of the beef sold, nor does it appear, but that the plaintiffs purchased the whole, which the defendants had in their store-house. The only testimony respecting the delivery, was that of *James Giles*, who swore, that at the time the money was paid for the beef, he understood it was to remain in the defendant’s slaughter-house, until it was shipped to *New York*. Under these circumstances I should suppose, that the inference of law would be, that it was at the risk of the vendee, with respect to future damage, unless occasioned by the gross negligence of the vendor. If there was a delivery, the present action is not maintainable, it being founded on a supposed breach of contract, for non-delivery. But we are not authorized by the case to direct a non-suit to be entered. We can, therefore, only award a new trial, with costs, to abide the event of the suit.”—“In this case there was nothing from which to infer a delivery of the property, but the payment of the purchase money, and the understanding that it was to remain with the vendor until it was shipped to *New York*. In a note to be found in *Com. on Cont.* 137, this case is referred to as establishing the principle, that if, on the sale of goods, the purchase money be paid, though the goods are suffered to remain in the possession of the vendor, by agreement or otherwise, this will be deemed a constructive delivery. There can be no doubt that a delivery of property sold, may be presumed from circumstances, and that an actual delivery is not in all cases necessary to pass the property. Instances have been already mentioned where a delivery may be presumed. So if the vendor gives to the

vendee an order on a third person, in whose possession the goods are, for their delivery, it is sufficient to take the case out of the statute of frauds. In 3 *Caines' New York Term Rep.* 186, *Mr. Justice Spencer*, in delivering the opinion of the court says, when speaking of such an order, "The order itself is a delivery so as to prevent the operation of the statute," and for this principle refers to the case of *Searle vs. Keener*, 2 *Esp. Rep.* 598. The facts of that case were as follows, in an action for not delivering a quantity of rice, it appeared that the defendant had informed the plaintiff, that defendant had a quantity of rice to sell: there was no evidence to prove any contract made, but the plaintiff produced an order on *Bennet & Co.* to deliver to him twenty barrels of rice, which was signed by defendant, and a witness proved, that defendant had told him, that he had sold twenty barrels of rice to the plaintiff, at 17s. per hundred. The plaintiff then proved the delivery of the order for the rice, to the warehouseman of *Bennet & Co.* The rice not having been taken away immediately, the defendant afterwards countermanded the delivery, in consequence of which *Bennet & Co.* refused to deliver the rice to the plaintiff, who sent for it some days after the order had been countermanded. *Eyre, Ch. J.* was of opinion, that the order for delivery, directed to the person in whose possession the rice was, amounted to a delivery, so as to take the case out of the statute. Upon the execution and enrolment of the bill of sale in this case, made by *John E. Clary* to *William H. Poole*, and upon the payment of the purchase money which is admitted by the deed offered in evidence to the jury, there can we think be no doubt, that the property passed to *Poole*, and that the actual possession being retained by *Clary*, he must be considered as holding the same merely as the bailee of *Poole*, and subject to his disposal. This being the character and capacity in which he held the property, the transfer and sale by *Poole* of all his right and title to the appellants in this case, by the execution and delivery of his written assignment for the same to them, operated as an order from him upon *Clary*, for the delivery of the horse

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then in his possession, and being considered in that respect, was sufficient evidence to go to the jury to prove a delivery in this case. If this view of the law be correct, the court below were in error in their refusal of the plaintiffs' prayer, for their opinion and instruction to the jury.

But there is another aspect under which this case may be considered, which entitled the plaintiffs to the instruction solicited from the court below. We have assumed that the ground upon which the prayer of the plaintiffs was refused, was the want of sufficient proof of a delivery of the horse sold by *Poole* to the appellants. If they acquired the legal title and property of the horse by the purchase, in legal construction, the legal title drew after it the constructive possession, which we think might well operate in law as a constructive delivery, it being a rule of law that the general property of personal chattels, *prima facie*, draws to it the possession. 2 *Philips' Evid.* 133, in a note and the cases there cited. So in 2 *Wheat. Sel.* 524, we find the same principle established, where in trover the plaintiff as executor declared upon the possession of his testator, it was holden to be sufficient, because the personal property of the testator was vested in the executor, and no other person having a right to the possession, the property drew after it the possession in law. It moreover appears that a part of the goods sold, were delivered by the vendor to the vendees, and accepted by them, and the horse being absent in the possession of *John E. Clary*, the original vendor, they were assured by their vendor, that they would surely get him, and they must go and get him wherever he might be. On the following day they went in pursuit of the horse, and found him in the possession of a constable by whom he was sold to the defendant as the property of *John E. Clary*, the original owner of him. Although there was no proof of an actual delivery of the horse by *Poole* to his vendees, yet as the horse was in the possession of *John E. Clary*, as the bailee of *Poole* at the time he made his sale to the plaintiffs, and at the time he went to his house to make an actual delivery of him to them,

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and when the direction was given to go and take possession of him wherever he might be found. We think the proof was sufficient to pass the property and right of possession, which alone are sufficient to support the action of *replevin*, and that the plaintiffs' prayer to the court below, ought to have been granted. The judgment of the court below is therefore reversed.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JESSE POCOCK vs. JOSHUA HENDRICKS.—*June, 1837.*

Evidence by a justice of the peace, that when called upon by parties to prepare conveyances for them, it was his habit to inquire whether they desired absolute, or conditional conveyances, that he had no doubt such inquiry was made in the present instance, and that he never failed to shape the paper according to the expressed purpose of the parties; and that he was also in the habit of reading the papers, after they were written, to those for whom they were prepared, and especially if they were workmen: *Held* to be inadmissible.

It is for the jury to decide, whether a variety of facts and circumstances admissible as evidence, are sufficient in point of fact to prove that a bill of sale was fraudulently obtained.

If the instrument under which the plaintiff claims in an action of trover, is proved, or conceded to have been obtained by fraud, it is of no validity; and the defendant may rely upon such invalidity as a bar to the action.

The act of assembly prohibiting the bringing or importing into this state of slaves for sale or to reside, provides, that persons brought into the state contrary to the act, if slaves before, shall thereupon immediately be free; but to entitle the slave to his freedom in such case, the bringing into the state, must be shown to be by the owner, or by his authority, or with his approbation. If a stranger without the authority or approbation of the master, bring a slave into the state, such slave is not entitled to his freedom.

APPEAL from *Baltimore* county court.

This was an action of trover brought by *Jesse Pocock*, against *Joshua Hendricks* on the 10th May, 1832. The defendant pleaded not guilty, and limitations on which issues were joined.

At the trial of this cause, the plaintiff offered in evidence a

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bill of sale of a negro boy, named *Richard Hughes*, dated the 28th September, 1825, from *Mary Hare* to him, for the consideration of \$100, which was duly acknowledged, and recorded.

And also offered evidence, that said *Mary Hare* previous to the year 1825, and at that time was in the possession of the said *Dick*, and exercised acts of ownership over him; that soon after said bill of sale, the said boy came to the farm of the plaintiff, and continued working there until about the last of February, or first of March, 1828, when he went to his former mistress, the said *Mary Hare*, who resided in the state of *Pennsylvania*, with the said defendant; that the said *Mary Hare* was of infirm health, and that the said *Dick* returned to her with the consent and approbation of the plaintiff, who declared that he might remain in the service, and employment of the said *Mary Hare* as long as she lived. That the said *Mary Hare* died about the 6th of January, 1832, and that between the 20th and 23d of the same month, of the same year, the plaintiff demanded the said *Dick* of the defendant, in whose possession he was in *Pennsylvania*, who replied that the boy belonged to him, and that he would defend him with his last cent.

The defendant then, to support the issue on his side, offered in evidence certain depositions, taken under a commission, viz :

Maria Hutchens deposed, that she has known *Jesse Pocock* ever since she can remember, and that she has known *Joshua Hendricks* for about twenty-seven, or twenty-eight years. That she knew a coloured boy named *Dick*—thinks *Dick Hughes*—he was the son of *Cass Johnson*, a coloured woman, and that his father's name was *Jim*, thinks *Jim Hughes*—and that said *Dick* or *Richard* was claimed and owned by *Sarah Galloway*—she further states that her means of knowing the above facts are or were as follows—about twenty-four years ago, precise time not recollected, *Sarah Galloway* now *Sarah Hendricks*, then residing on “*My Lady's Manor*,” near *Gunpowder falls* in *Baltimore* county, state of *Maryland*,

purchased a black woman, named *Cass Johnson*, for a term of years from *Philip Garretson*, and paid for her; and that after said *Cass* became the property of the said *Sarah Galloway*, and before said *Sarah* was married to *Joshua Hendricks*, said *Cass* had two children, one named *Joshua* and the other *Dick*, and after said *Sarah* was married, she sold *Josh* to *Charity McClung*, for \$100, and said *Dick* was left with *Mary Hare*, the mother of said *Sarah Galloway*, now *Sarah Hendricks*, to wait upon her, said *Mary Hare*, as long as she the said *Mary* lived, and at said *Mary's* death, was still the property of the said *Sarah Galloway*. *Mary Hare* only claimed the services of said coloured boy *Dick*, as long as she lived—said *Sarah Galloway* lived with her mother, *Mary Hare*, before her marriage, and said blacks were kept about the house. Deponent further states, that she always understood from *Mary Hare*, that said coloured woman *Cass*, and her two children, *Josh* and *Dick*, were the property of said *Sarah Galloway*, now *Sarah Hendricks*, and that said *Mary Hare*, had, nor held, no other claim upon said coloured woman and her children, than the services of said *Dick*, as long as she the said *Mary* lived—that she recollects, that after *Sarah Galloway* was married to *Joshua Hendricks*, said coloured woman *Cass*, remained with *Mary Hare*, and had two more children, *Rachael* and *Luce*.—Witness thinks the reason why said coloured woman remained with *Mary Hare*, after said *Sarah Galloway* was married, was that she the said *Sarah* could not take her to the state of *Pennsylvania*, to which state she removed. Witness further states, that she is the daughter of the said *Mary Hare*, and is the sister of the said *Sarah Galloway*, and lived between one or two miles from her said mother's residence, in *Baltimore county, Maryland*, at the time she has spoken of. After said *Sarah* was married, she sold the said *Cass'* time, to whom, she does not recollect.

Jesse Hutchens deposes, that he has known *Jesse Pocock* ever since he has known himself, and that he has known *Joshua Hendricks* for about twenty-eight years past.—That he knew a coloured boy called *Dick*, or *Richard Hughes*—

he was the son of *Jim Hughes* and *Cass Johnson*, who were coloured people. He, witness, states that he lived, at the time he was acquainted with the facts, he has and is about to state, between one and two miles from the residence of *Mary Hare*, in *Baltimore* county, state of *Maryland*, before, at, and after the marriage of *Sarah Galloway*, to *Joshua Hendricks*, and always understood at that time, and ever since, that *Sarah Galloway* before her said marriage, purchased said coloured woman *Cass*, for a term of years, from *Philip Garretson*, and paid for her, and that said *Cass* had two children, named *Josh* and *Dick*; and he, witness, further states, that he always understood said coloured woman *Cass*, and her two children, were the property of said *Sarah Galloway*; this he understood from *Mary Hare*, the mother of the said *Sarah*. Witness further states, that he is very certain, that old *Mrs. Hare*, never claimed the black boy *Dick*, as her own property, but only the services of the said *Dick*, as long as she lived, to wait on her. *Sarah Galloway*, now *Sarah Hendricks*, before her marriage, lived with her mother *Mary Hare*, and said coloured woman, and her two children were kept on the place.—Witness recollects of *Sarah Galloway* selling the boy *Josh* to *Charity McClung*, wife of *Joseph McClung*, for \$100. Witness states, that *Cass* remained with *Mary Hare*, sometime after *Sarah Galloway* was married, and removed to *Pennsylvania*.

Joshua Green deposes, that he is well acquainted with plaintiff and defendant, that he has seen the negro boy *Dick* frequently. He was said to belong to *Jesse Pocock*. That some time after this same black boy, now in dispute, between *Jesse Pocock* and *Joshua Hendricks*, was in the possession of *Joshua Hendricks*, I saw *Jesse Pocock*, and asked him if he was not afraid that his black boy would be free, by the laws of the state of *Pennsylvania*, to which *Jesse Pocock* replied and said, that the black boy did not belong to him, that he belonged to *Joshua Hendricks*, or he is a part of *Sally's* estate, and is none of mine.

The defendant further offered evidence to prove that *Mary*

Hare, came to reside with witness's father, the defendant in this cause, in the state of *Pennsylvania*, in the year 1827, and thus continued to reside until her death, which occurred about the 6th January, 1832, that said boy *Dick* came to said defendant's to be in the service of *Mrs. Hare*, in February or March of the year 1828. That shortly after he returned to *Mr. Pocock*, his former master, for his clothes, and then coming back, he remained until the first of the ensuing May, at which time he was hired to a certain *Elijah Galloway*, who resided in the city of *Baltimore* for the benefit and advantage, and by the direction of *Mrs. Hare*, where he continued until late in the following fall—that being sick, he was again carried by the daughter of *Mrs. Hare* to the state of *Pennsylvania*, where he remained about six or eight weeks, when he returned to *Galloway's* in *Baltimore*, and there staid to complete his time of two years. About the 1st September, 1830, the said boy went again to *Pennsylvania*, and immediately after worked with one *Walker*, who resided in *New Market, Maryland*, for one month; that during the one month the boy returned to defendant's every Saturday night, where his washing was done for him, that by the end of the said month, the said boy, about the 1st of October, went to the defendant's house, where he continued until about the last of March, 1831, when he was sent again to the said *Galloway's* with whom he continued to live, and with whom he was when the witness left the state of *Maryland*, on the 1st of October, 1831, to go to the state of *Ohio*, after which he knew nothing further of the said *Dick*. The defendant further offered evidence that the plaintiff and defendant lived within a mile or two of each other, the defendant in *Pennsylvania*, the plaintiff in *Maryland*; that the said boy *Dick*, between the years 1828 and the death of *Mrs. Hare*, was frequently in the state of *Maryland*, once or twice at a husking match on the farm of the plaintiff, also at a camp meeting in the neighbourhood, and that he appeared at all times openly, and it was notorious to the neighbours that he resided with the defendant for the period above stated.

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The defendant also offered evidence to prove that on the morning of the 28th of September, 1825, the plaintiff waited on *Mrs. Hare*, and requested her to give him an instrument lest he should have money to pay. Witness persuaded him to wait until *Elisha Galloway*, who was the son of *Mrs. Hare*, should return from market, and witness kept them from going for an hour, but they afterwards went—something was said in this conversation about the boy *Dick*, and his being an indemnity, and about the suit of *McClung's*, and that plaintiff said he did not wish to claim the boy unless he should be obliged to pay the money. The defendant proved that *Mrs. Hare* could not write or read writing, and then offered in evidence from the records of *Baltimore* county court, certain docket entries in four suits, the two brought by *McClung* against *Mrs. Hare*, and the others by the same persons against the plaintiff as security of *Mrs. Hare* on an administration bond, and also offered in evidence an order to enter the judgments in said suits, satisfied.

The defendant then proved that the money to satisfy said judgments had been paid to the amount of \$ 117.67 by *Elisha Galloway*, the son of *Mrs. Hare*. The defendant further proved, that in a conversation which the witness had with the plaintiff a short time before *Mrs. Hare's* death, he observed, "are you not afraid that *Dick* will be free," to which the plaintiff replied, "that he had the boy as a security and he believed the money was nearly paid up." The plaintiff then further to prove the issue on his part, offered in evidence by *William A. Schaeffer*, a competent witness, that he was a magistrate, and acted in that character in the fall of 1825, that on the day of the date of the said bill of sale, he was applied to by the plaintiff and the lady who executed the same, but whom he does not think he would now know if he were to see her, to prepare an instrument of writing for them, that he accordingly wrote the said bill of sale, and witnessed the signature of *Mrs. Hare* to it, and took the acknowledgment—that it has been a long time ago, and he does not recollect the conversation when the transaction

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occurred—that he is now, and was at that time, frequently called upon to prepare bills of sale and other instruments, and that he had by him forms of absolute and conditional conveyances by way of mortgage; and the plaintiff offered to prove further by the said witness that it was his habit to ask those who called upon him to prepare papers for them, whether they desired an absolute or conditional conveyance? That he has no doubt that such an interrogatory was in substance, put to the said *Mary Hare* and the plaintiff in the present instance, and that he never failed to shape the paper according to the expressed object of the parties.

To the whole of this last piece of evidence, the defendant objected as incompetent, which objection being sustained by the court, (*Purviance, A. J.*) the plaintiff excepted.

2d EXCEPTION.—The plaintiff then proved by the said witness, that he was in the habit of reading the papers after they were written, to those for whom they were prepared, and especially if they were workmen. The counsel for the plaintiff then asked the said witness whether from such his habit, he had any doubt that said bill of sale had been read to *Mrs. Hare* by him. To this question the counsel for the defendant objected on the ground, that any belief or impression of the witness drawn from his customary mode of transacting business with those who called on him to prepare papers, was incompetent evidence to go to the jury, that the said bill of sale was read to *Mrs. Hare* before she executed the same, which objection being sustained by the court, (*Purviance, A. J.*) The plaintiff excepted.

3d EXCEPTION.—The plaintiff further proved that witness went to the meadow of the defendant, late in the summer or early in the fall of 1825, and that the defendant being there, said to him, “tell your father, (that is the plaintiff in this cause) to get *Dick* from *Mrs. Hare* or he will never get any thing, and that if he, the plaintiff, did not get him, *Elisha Galloway* would,” and witness accordingly repeated the above message to his father, who about two or three weeks afterwards went to the house of the defendant, who in the

presence of his wife made the same statement in substance as herein just before stated. The plaintiff further to support the issue on his part, offered in evidence a bill of sale from the said *Mary Hare* to *Sarah Hendricks* for negro *Cass* and her children *Rachel* and *Luce*, dated the 15th day of May, 1817, and proved the due execution thereof by the said *Mary Hare*, and the acknowledgment and recording thereof.

Whereupon the plaintiff prayed the court to instruct the jury :

1. That if they believe from the evidence that *Mary Hare* had title to the boy *Dick*, or not having title if they believe that *Hendricks* was his owner, and advised the plaintiff to get him of *Mrs. Hare*, who accordingly applied to *Mrs. Hare*, and obtained from her the bill of sale of the 28th September, 1825, and that the said bill of sale was duly executed and acknowledged, and the plaintiff obtained possession of the said boy under the same, and peaceably continued therein until October, 1828, at which time the said boy by the direction and with the consent and permission of the plaintiff, went into the service of *Mrs. Hare* for her life, and continued therein until her death, which happened about the 6th January, 1832, and that the plaintiff about the 20th and 28th of the same month and year, did demand the delivery of the said boy from the defendant, who was in possession of him, and that the defendant refused to deliver him, asserting title in himself, then the plaintiff is entitled to recover.

2. That there is no evidence in the cause from which they can infer, that the plaintiff practised any concealment, misrepresentation, or fraud, to induce the said *Mary Hare* to execute the bill of sale of the 28th September, 1825, and that all the evidence offered by the defendant, to impeach the title of the plaintiff under said bill of sale, by showing that although absolute on its face, it was yet designed by the parties, as nothing more than a mortgage or indemnity, is wholly incompetent for that purpose, and cannot be considered by the jury.

3. That if they believe the title to the negro boy *Dick* was in *Mary Hare*, or if they believe the title not being in her, but in the defendant, and that the defendant advised the plaintiff to obtain the said boy *Dick* from the said *Mary Hare*, and that said plaintiff did in accordance with this advice apply to the said *Mary*, and get from her the bill of sale mentioned in the evidence, then the plaintiff is entitled to recover; although they should find, that it was agreed by the plaintiff and the said *Mary Hare*, that the said boy should be nothing more than an indemnity to the plaintiff, in the event of any loss by her sustained in the suit then pending against him in *Baltimore* county court as surety for said *Mary Hare*; provided the jury further believed, that the said plaintiff permitted the said boy to be hired out and otherwise employed for the benefit of *Mrs. Hare* during her life only, and that after her death he did demand the delivery of the said boy, being in the possession of the said defendant, who refused the same, claiming the property in himself.

4. If the jury believe, that *Mrs. Hare* did in fact, execute and acknowledge the bill of sale of the 28th September, 1825, and that the possession of the boy was delivered to the plaintiff, that the *prima facie* title of the plaintiff and his possession there under, cannot be called in question by the defendant, and under the general issue in this suit, by any allegation of fraud practised by the plaintiff on *Mrs. Hare* in the obtention of the said bill of sale.

Which prayers being refused by the court, (*Purviance, A. J.*) the plaintiff excepted.

4th EXCEPTION.—Whereupon the counsel for the defendant prayed, that if the jury shall believe from the evidence, that the boy in question, was in the year 1828, sent by the plaintiff or with his approbation and consent, out of *Baltimore* county, state of *Maryland*, into the state of *Pennsylvania*, to live in the service of *Mrs. Hare*, at that time a resident of the state of *Pennsylvania*, during the balance of her life; and that the boy did actually go, and for some time remain in her service; and if the jury shall further believe

that the said boy was afterwards brought back, or sent into the state of *Maryland* to reside, that then by the laws of this state, the boy is free, and the plaintiff is not entitled to recover. Which instruction being given by the court, the plaintiff excepted.

The verdict and judgment being against the plaintiff, he prayed an appeal to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, Judges.

R. JOHNSON, for the appellant, abandoned the first and second exceptions.

Under the third exception he insisted, that each of the four prayers offered by the plaintiff, were erroneously rejected in part, or in the whole.

1. Because upon the hypothesis of fact, stated in the first prayer, of which there was evidence before the jury, it was not competent for defendant to impeach the validity of the bill of sale, under which the plaintiff claimed.

2. Because, as assumed in the second prayer, there was no evidence to impeach the said bill of sale, on the ground of mistake or fraud.

3. That under the facts assumed by the third prayer, the plaintiff's title was a good one, as against the defendant.

4. That the bill of sale being executed, and the slave delivered in pursuance of it, the title was a good one as against the defendant.

Upon the fourth exception, he insisted that under the circumstances of the case, it was not in the power of the defendant to avail himself of the importation into the state of the slave in controversy, upon the hypothesis stated in the defendant's prayer.

This assumes that the plaintiff once had property in the negro, and it is predicated on all the evidence in the cause. It finds the defendant claiming title to the negro, and presents two contending parties, one demanding the slave by his action, and the other claiming to retain him. The defendant

failing to show title sets up the freedom of the negro, yielding up his own right. But freedom cannot be tried in this collateral way. The negro must assert that right, which he has not done. The prayer does not assume, that the plaintiff brought the negro back from *Pennsylvania*, nor that he was brought back to reside, or for sale. The *Pennsylvania* law is not before the court, and there is nothing which forbids a *Maryland* master, from sending his slave to *Pennsylvania*, and taking him elsewhere. The plaintiff did not bring the negro back, and if sent here by a stranger, it does not produce his freedom. Under our laws, the effect of the residence in *Pennsylvania*, is not before the court, and it is the importation into *Maryland*, which gives freedom here. The carrying out, and the importation must be voluntary, and by one of full age, and the master must assent to it.

If there is error in any one instruction, material to the plaintiff's right, there must be a *procedendo*.

DORSEY, Judge, delivered the opinion of the court.

The objections raised in the two first exceptions taken by the plaintiff were rightly sustained, according to the principles settled in the case of *Flack vs. Green*, 3 *Gill and John*. 474.

The next inquiry is, did the county court err in rejecting the plaintiff's four prayers in the second bill of exceptions. The propriety of granting the three first prayers depends entirely upon the question, whether there was evidence in the cause legally sufficient to have been left to the jury to find the fact; that the bill of sale from *Mary Hare* was fraudulently obtained by the plaintiff. There is no evidence other than the bill of sale itself; that any consideration was paid by the plaintiff to *Mary Hare*; or that they stood in any relation to each other, which rendered it probable that such a bill of sale would have been executed, but upon full and adequate consideration; nor is it in proof, that the bill of sale was ever read, or its import communicated or explained to *Mary Hare*. It is in evidence that she could neither

write, nor read writing ; that by the agreement of the parties the instrument to have been executed was not an absolute bill of sale, but was intended to secure the plaintiff from loss by reason of his securityship for *Mary Hare* ; that he acknowledged the negro was not his property but belonged to the defendant, (who married *Mary Hare's* daughter,) as part of his wife's estate ; that he held the negro in question as security for a liability which was nearly or quite extinguished ; that after obtaining the bill of sale and possession of the negro, and after his liabilities were discharged, he suffered the negro slave to go to *Mrs. Hare*, in *Pennsylvania*, and remain with her or in her service more than three years, and until the time of her death ; and that when asked if he were not afraid he would lose his slave by reason of the emancipation laws of *Pennsylvania*, he replied, that he had the boy as a surety, and that he believed the money was nearly paid up. Whether these facts are sufficient in point of fact to prove that this bill of sale was fraudulently obtained, it is the exclusive province of the jury to determine ; but that they are legally sufficient to be left to the jury to be by them considered, in determining the question, we entertain no doubt. As the fourth prayer which we are called upon to decide is made upon the concession that the bill of sale was obtained by actual fraud practised by the plaintiff, we have only to say that the instrument in question being at law of no validity, we can see no reason why the defendant may not rely upon its invalidity in bar to the plaintiff's action.

In the last exception the prayer on the part of the defendant would have been rightly granted had it called on the jury to find one additional fact, viz : That the bringing of the negro back into the state of *Maryland* to reside, was the act of the plaintiff, or was done by his authority, or with his approbation. In granting the prayer, the county court have in effect said, that if the bringing the slave to *Maryland* to reside was the act of a stranger without the authority or approbation of the plaintiff, still the slave is entitled to his freedom. Such a decision is neither conformable to the

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letter or spirit of the act of assembly, which after prohibiting the bringing or importing into this state any slave for sale or to reside, provides that, any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon immediately cease to be the property of the person or persons so importing or bringing such slave within this state, and shall be free. We concur with the county court in sustaining defendant's objections to testimony taken in the first and second exceptions; and in all their refusals to grant the prayers made on behalf of the plaintiff, but dissent from the instruction given to the jury at the instance of the defendant's counsel as stated in the *third* exception, and therefore reverse their judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

IGNATIUS B. NEWTON vs. FRANCIS B. C. TURPIN AND JACOB C. WILLSON, *adm'rs of* FRANCIS TURPIN.—*June Term, E. S. 1837.*

In an action of *trover* for the value of a negro, sold, and converted by the defendant to his own use, it would be competent to him, under the plea of not guilty, to prove the right of the negro to his freedom.

The legislature of Delaware in 1787, passed a law, declaring that all slaves carried into that state, after its passage, for sale, should be free; with a proviso, that it should not extend to or affect persons removing into that state, from any other state with their families, or becoming residents thereof, &c. *Held* that persons removing into Delaware from the District of Columbia, were within the spirit and intention of the proviso, which was to encourage persons to remove with their slaves and settle in the state, and that consequently their rights of property were protected by it. In construing a law in reference to rights of property, the same strict and literal interpretation is not adopted, as is on some occasions resorted to, in reference to grants of special limited jurisdiction.

APPEAL from *Dorchester* county court.

This was an action of *trover* for the value of a negro girl, brought on the 31st of March, 1829, by the appellant, against

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Francis Turpin: The death of the defendant being suggested, his administrators were made parties, and pleaded that their intestate was *not guilty*.

At the trial of the cause the plaintiff offered evidence to sustain the issue on his part, that *Francis Turpin*, the intestate of defendants, resided in *Maryland*, and owned the said negro as his slave, who also lived in *Maryland*; that he gave the said negro slave to his daughter, who intermarried with the plaintiff; that the plaintiff after the said gift, removed and carried the said negro girl to *Georgetown* in the *District of Columbia*, and resided there for some time; and afterwards, in the year 1826, removed his family and carried the said negro girl slave into the *state of Delaware*, and there resided with his said family and the said negro girl, during the years 1826, 1827, 1828, and 1829. That some time in the year 1829, the said *Francis Turpin*, the intestate, took and sold the said girl, and converted her to his own use in *Dorchester county* in *Maryland*. The defendant on his part offered in evidence the following act of assembly of *Delaware*, duly authenticated according to the act of congress, to wit:—Act of the general assembly of the state of *Delaware*, passed 3d February, 1787:

Be it enacted, That if any person or persons, shall after the passing of this act, bring any negro or mulatto slave into this state, for sale, or otherwise, the said negro or mulatto slave is hereby declared free to all intents and purposes. Provided nothing in this act, shall be construed to extend or affect, any person or persons, who may move into this state from any other state, with his or her family, and become residents thereof, or who may be travelling through the same, with his or her servants, or slaves, or any inhabitants of this state moving with his or her family into any other state.

Whereupon the defendants prayed the court to direct the jury, that if they find the above facts to be true, that the said negro was entitled to freedom under the laws of *Delaware*, and the plaintiff in that case cannot sustain his action, and the defendants are entitled to a verdict in their favour. It

is agreed between the parties aforesaid, by their attorneys, that the verdict to be found by the jurors, shall be subject to the opinion of the court on the above prayer and point saved.

H. PAGE, *Attorney for Plaintiff.*

JOSIAH BAYLEY, *for Defendants.*

The county court gave judgment for the defendants, *pro forma*, and the plaintiff appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

DORSEY, Judge, delivered the opinion of the court.

The *pro forma* judgment of the court below, we think in this case, ought to be reversed; not because the defence set up by the defendants is inadmissible, between the parties, under the pleadings in this cause, but because the slave in question, under the act of assembly of the state of *Delaware*, is not entitled to her freedom. The design of the proviso or exception in the act of assembly, was to encourage persons removing with their slaves, to settle in Delaware. There could have been no motive with the legislature of the state of Delaware in protecting settlers removing from the state of *Maryland* or *Virginia* in the enjoyment of their rights as slaveholders, which did not apply with equal force to like settlers from the *District of Columbia*. To give to the word "state" in this act of assembly the literal technical import ascribed to it, would be to violate its spirit, the sound and obvious meaning of the law. We do not hold ourselves bound when interpreting its import in reference to rights of property, to give to it the same literal, restricted interpretation, which it has, on some occasions received, when used in reference to a grant of special limited jurisdiction. The judgment of the county court is reversed. Let judgment be entered for the plaintiff according to the agreement of the parties contained in the record.

JUDGMENT REVERSED.

HENRY HAMMOND vs. NATHAN AND HENRIETTA HAMMOND.—*June, 1837.*

H, by his will dated in 1828, devised and bequeathed to his wife, one-third part of his real and personal estate, and to his two sons, *Henry* and *Nathan*, in fee simple, all his real property in the city of *Annapolis*. To another son, and his heirs for ever, he gave his plantation in *Anne Arundel* county; and all the rest and residue of his estate, both real and personal, after his wife's third should be taken out, he devised and bequeathed to his three sons, share and share alike. Held, that under this will, the wife was entitled to that share of her husband's estate, which the law gave her, and no more; that is, one-third of the real for life, and one-third of the personalty absolutely.

The word "estate" in a devise, will be *descriptive* of the subject of property, or the *quantum* of interest, according to the context, and will pass a fee, when the intention of the testator does not restrict it, to import a description, rather than an interest.

Since the act of 1825, *ch.* 119, a general devise in which words of limitation, or perpetuity are omitted, will pass the whole interest of the testator, upon the assumption that he so intended; that assumed intention, however, being subject to be controlled, by evidence of a contrary intention, indicated by a devise over, by words of limitation, or otherwise.

APPEAL from Chancery.

On the 13th November, 1834, the appellees filed a bill, charging that *Henry Hammond*, deceased, the father of *Nathan*, and husband of *Henrietta*, by his last will and testament, bearing date the 26th of February, 1828, made the following devises:

"I devise and bequeath to my dear wife, *Henrietta Hammond*, one-third part of my real and personal estate. I give and devise to my sons, *Henry Hammond*, and *Nathan Hammond*, in fee simple, all my real property in the city of *Annapolis*."

"I give and bequeath to my son, *John Thomas Hammond*, my plantation in *Anne Arundel* county, called, &c. to him and his heirs for ever."

"I devise and bequeath all the rest and residue of my estate, both real and personal, after my wife's thirds are taken out, to be equally divided amongst my three sons, *Henry*, *Nathan* and *John Thomas Hammond*, share and share alike, and departed this life, leaving the said will in force.

That *Henry Hammond* had conveyed his interest, to *Robert Welsh*, of *Ben.*; that the house and lot in the city of *Annapolis* not being capable of division amongst the parties entitled; prayer for a sale of that, and distribution of the proceeds amongst those entitled, according to the will.

The defendants consented to a sale, which was made by a trustee of the court.

Upon a reference to the auditor, the proceeds of the *Annapolis* property were distributed equally, and absolutely between *Henry*, *Nathan* and *Henrietta Hammond*.

Henry Hammond, the appellant, excepted to the account.

1. Because it appropriates to *Henrietta*, one-third of the net proceeds of sale, whereas according to the true construction of the will of her husband, she was only entitled to the value of her life estate, in one-third of the estate, or its proceeds.

2. By the true construction of the will, and the act of 1825, *ch.* 119, the said *Henrietta*, was only entitled to a dower interest in the estate sold, and is now entitled to receive in money, the value of such dower, according to the rules of the court of Chancery.

His honour the chancellor (*Bland*,) on the 30th December, 1835, overruled the exceptions, and ratified the account.

The cause came up on the appeal of *Henry Hammond*, and was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, Judges.

PINKNEY, for the appellant, in support of his exceptions contended:

That where a testator devised all his estate, to A. the interest of the testator passed: but where the word estate was intended to describe the *corpus*, and not the interest, the devisee only took a life estate. . *Ram. on Wills*, 30. 8 *Law Lib.* 1 *Ves. Sr.* 226. *Cowper*, 306. 2 *Term. Rep.* 659. 7 *Ves.* 541, 544. 2 *Pr. Wms.* 336. The intent of the testator, was to give his wife a life estate, in one-third of

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his real property, and he used the term in opposition to its technical meaning. *Cases Tem. Talb.* 157. If *Mrs. Hammond* took an estate in fee simple, it was impossible to reconcile it with the other clauses in the will. The first clause upon that hypothesis, is not reconcilable with the devise to her sons, nor to *John T. Hammond*.

The residuary clause was to operate on something, and if the first devise was universal, as its language imports, there was then nothing for the residue to operate on.

Every word in a will must have effect, if capable, without violation of the testator's intention. 7 *Bac. Abr.* 341.

If parts of a will are inconsistent, the subsequent words must prevail.

The act of 1825, *ch.* 119, does not give *Mrs. Hammond* an estate in fee, as contended for. That act was intended to refer to devises of land *eo nomine*, and the devise to the sons is a limitation over of the estate, devised to the wife and within the savings of that act. 4 *Boss and Pul. N. R.* 220.

RANDALL, for the appellee.

The only point at issue, is whether the widow has an estate for life, or in fee. The words of her devise give her a fee in one-third of the real estate. The rules of decision are collected in 2 *Prest. on Est.* 145; and it is admitted that the word estate, is susceptible of application, either to the *quantum* of interest, or description of property, according to the context. 8 *Law Lib. Ram. on Wills*, 119. 4 *Kent*, 535. 6 *Har. and John.* 228. The devise here applies the word estate, to both kinds of property—no words in *juxta* position control its meaning, nor words of locality, which now are not held to be words of limitation. The current of modern authority, is in favour of extending the word estate, and thus carrying out the intention of the testator.

The case cited in *Pr. Wms.* was decided in 1725—was before the king in council—not argued by lawyers, and is not authority.

It turned on a question of intention, and not on the

meaning of the word estate. That term when used without restriction carries the whole estate, and here it carries a fee, unless the intent be against it.

The first, last, and principal object of the testator's bounty, was his wife. In cases of doubt the principal intent, and primary object of the testator's bounty, is much regarded.

The widow under the will is a purchaser for a valuable consideration, and is to be protected accordingly. 4 *Har. and John*. 480. And she does not contribute in making up deficiencies. 1 *Dess*. 471. 3 *Ib*. 49.

The will is to be construed, without reference to the *quantum* of *Henry Hammond's* estate. If the special devisees be all the testator has, then if the devisees have a fee as contended for—the negroes being all manumitted, there is no fund for the widow's part. 6 *Binney*, 94. 4 *Maul and Sel*. 369.

The absence of restrictive words, in the case of a devise to a widow, argues more strongly as to the extent of her estate than that of other devisees.

In this will, if the first section only creates a life estate, then the residuary clause gives the wife an absolute estate in that before given for life, and thus disposes of the whole estate.

The meaning of the word estate is illustrated by the case, 8 *Term Rep*. 64, and by *Ram. on Wills*, 146. And if that word does not give an estate in fee, the act of 1825, *ch*. 119, applies to the devise and enlarges it.

ALEXANDER, for appellee, further contended :

The devise to the wife, under the act of 1825, will give her a fee, unless a clear intent in the testator to the contrary appears.

There is no devise over of this property, and the devise to the two sons, can as little be held to be a devise to the wife *for life*, as in fee—still the life estate is not questioned.

The only question is, whether the intent otherwise appears than by the devise over, or by limitations.

A devise of a man's estate, is not more ample than of his real and personal estate. The testator intended she should have the same extent in both, the real and personal estate. This is the common sense rule. This is a devise of one-third part of his real and personal estate, and the court cannot construe it to mean one-third part of one, absolutely, and one-third part of the other for life. Estate has a different meaning from property. There are no words of perpetuity in the last clause, and if that circumstance diminishes the estate of the wife in the first clause, so may it produce the same effect on the second and third devise. 8 *Durn. and E.* 50. 3 *Atk.* 486.

N. BREWER, JR. in reply.

The general rule is not disputed; generally the word estate will carry a fee. The exception is, when the word is restrained by the context.

There is no such case as a devise of one-third of an estate, or any numerical portion of an estate, which carries a fee in real property. It is different from a devise of the estate. Estate in this case is equivalent to one-third of the land. The testator meant to give his wife that portion of his estate which the law gives her. His intent is to prevail, whether the will is construed under the act of 1825, or at common law.

The last clause, containing the words, "after my wife's thirds are taken out," is in some measure technical, and this exception in the last clause, illustrates what he meant in the first.

A will must be construed so as to be consistent with itself. 6 *Ves.* 102. 5 *Ib.* 249. The effect of the construction on the other side is, to carve an estate out of the sons' property, wholly inconsistent with the will.

CHAMBERS, Judge, delivered the opinion of the court.

The word estate in a devise, will be descriptive of the subject of property, or the *quantum* of interest, according to the context. It will pass a fee whenever the intention of the

testator does not restrict it to import a description, rather than an interest.

In pursuing the intention, we must regard all parts of the will, and the relation of the devisees to the testator, and to each other, and that purpose is to be received, as intended by the testator, which will most effectually carry into execution all the different provisions of the will, and make them consistent with each other. These are rules of construction familiar in theory, but often found difficult in their practical application. To these rules another, of great importance, has been added by our act of assembly, 1825, *ch.* 119.

It had often occurred that testators in making a disposition of their property, without professional aid, omitted words of limitation, in cases where from the relation of the parties and the entire failure to pass away any reversionary interest in the property, it was more than probable, the omission was occasioned by want of information, and not by design, and yet the court, whose duty it is to construe, not to make wills, were confined to the language of the will, as the index of the testator's intention, and could not enlarge the interest of the devisee beyond a life estate. Such a case, perhaps, was that of *Beall vs. Holmes*, 6 *Har. and John*. 205.

The act of 1825, proposes a remedy for devisees in this condition. It assumes, that a testator may not know that terms of limitation are necessary, and directs, that if no words of perpetuity are added to the devise, it shall be intended that the whole estate and interest of the testator was designed to be passed; leaving that assumed intention, however, subject to be controlled by any evidence of a contrary intention, indicated by a devise over, by words of limitations, or otherwise. It reverses the principle of law, which considered an estate for life to pass by a general devise, without words of limitation, or other words clearly indicative of an intention to pass a larger estate, and says a larger estate shall pass by such general devise without words of limitation, unless the will contain a devise over, or manifest by some other words, an intention not to pass more than an estate for life.

We think, in this case, the will does furnish evidence that the testator intended to devise to *Henrietta Hammond* a less estate than the whole interest or estate, in fee simple, of which he was seized; and, therefore, that the act of 1825 cannot in any respect influence the case.

The devisee was the wife of the testator, entitled upon his death to a life estate, in one-third part of his real estate, and to an absolute interest in one-third of his personal estate, and we think the whole will manifests his knowledge of such her claims, and a design to insure to her the full enjoyment of her rights, and no more.

The whole of his real property, in the city of *Annapolis*, is devised to the two sons, *Henry* and *Nathan*, and the whole of the plantation in *Broad Neck*, is devised to the third son, with apt words to pass the fee.

These three devisees cannot take, according to the plain import of the devises to them, upon the hypothesis assumed by the appellee, that is to say, they cannot take a fee simple in the whole, if the widow has a fee simple in a third; but they may take, pursuant to the devise, upon the concession, that she has a dower interest; that is to say, the sons take a fee simple in the whole property devised to them, subject to her dower.

The residuary clause most impressively defines the sense in which the testator himself translated his former devise to his wife. It does not, in form, devise or bequeath to her, a proportion of any other property he had or might have, but it assumes the interest she had in it to be her third.

In common *parlance*, a wife's third in her deceased husband's estate, is the precise definition of dower; and the most familiar mode of recognizing the existing right of a widow to her dower is, to commence a devise with these expressions, *after my wife's thirds are taken out, I devise, &c.*

In this view of the residuary clause, it is not important, whether the testator had other real estate than that previously devised to his sons.

If he had, he clearly considered it incumbered with his

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wife's dower, and designed it to pass by the residuary devise subject to that incumbrance. If he had none, it was no more than a prudent care to guard against the accident of omitting any portion, after an enumeration of all he could mention, but the same indication is furnished, that he considered it, should there be any subject thus to be encumbered, in virtue of his devise previously made.

By this construction we think every clause in the will is made to operate according to the plain obvious sense of the language of the testator; that consistency can be obtained, and a conflict avoided by no other construction, and that the intention of the testator, apparent upon the face of the will, requires it.

DECREE REVERSED.

THE WILMINGTON AND SUSQUEHANNA RAIL ROAD COMPANY *vs.* JOSEPH CONDON.—June, 1837.

The jurisdiction given to the county courts, to review, confirm, or set aside inquisitions had, under the provisions of the law authorizing the appellant to condemn land, for the construction of its road, is special and limited, and from its decisions, no appeal lies to any other court.

Where the company, subsequent to such inquisition, occupied the land condemned and commenced the construction of their road, *Cecil* county court, (*Chambers, Ch. J. and Hopper and Eccleston, A. Js.*) refused to hear evidence in support of objections filed by the company to the inquisition, and confirmed it.

APPEAL from *Cecil* county court.

On the 26th day of October, 1836, *The Wilmington and Susquehanna Rail Road Company* filed the following warrant, inquisition, and sheriff's return, to wit:

State of Maryland, Cecil county, sc.

To *Noble Pennington*, Esquire, sheriff of *Cecil* county, Whereas application hath this day been made to me, the subscriber, one of the justices of the peace of the said state,

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for the county aforesaid, by *The Wilmington and Susquehanna Rail Road Company* by *John C. Groome*, their attorney, for a warrant under my hand and seal, to be to you directed, requiring you to summon a jury to value the damages which the owner of a certain tract, piece, or parcel of land, lying and being in *Cecil* county aforesaid, now in the possession of, and said to be owned by *Joseph Condon* of said county, will sustain by the use or occupation of such part thereof, by the said company, as may be by them used and required, pursuant to the provisions of acts of assembly of the said state of *Maryland*, passed at December session, in the year 1831, ch. 296, entitled an act to incorporate the *Delaware and Maryland Rail Road Company*. These are therefore to authorize and require you, to summon in the manner prescribed by said act, a jury of twenty inhabitants of *Cecil* county aforesaid, not related, nor in any wise interested, to meet on the part of the said lot, piece, or parcel of land to be valued, on Tuesday, the 19th day of July next, of whom the twelve that may remain after four jurors have been stricken off by each party in conformity with said act, shall act as the jury of inquest of damages, which the owner of the said tract, piece, or parcel of land, will sustain by the use or occupation of such part thereof by the said company as may be by them used, occupied, and required, and for so doing this shall be your sufficient warrant. Given under my hand and seal this 30th day of June, 1836.

JOHN A. RANKIN, [seal.]

“Inquisition taken on the lands and premises hereinafter mentioned and described, situate, lying and being in *Cecil* county, on this nineteenth day of July in the year of our Lord one thousand eight hundred and thirty-six, before *Noble Pennington*, Esquire, sheriff of said county, by virtue of a warrant heretofore issued by *John A. Rankin*, Esquire, a justice of the peace for said county, and to the said sheriff directed, by the oaths of *Benjamin F. Machall*, *William B. Biles*, *Stephen H. Ford*, *Robert Cather*, *Jacob Ash*, *John Mackey*, *Charles Brookings*, *Johoiakin Brickley*, *Thomas T.*

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Gillespie, Bennet F. Bussey, and William H. Wilson, and by the affirmation of *Thomas Richards*, inhabitants of said county, not related, nor in any wise interested; who say that the lands owned or claimed to be owned by *Joseph Condon* and herein after valued for *The Wilmington and Susquehanna Rail Road Company*, formerly called the *Delaware and Maryland Rail Road Company*, are contained within the following courses and distances, that is to say, beginning at, &c. and containing eleven acres and thirty-four hundredths of an acre, be the same more or less, and the jurors aforesaid by their oaths aforesaid, also say that, they value the said lands and premises so as aforesaid described, and all the damages which are and will be sustained by the said *Joseph Condon*, and by every and all other owner or owners thereof, (be they whosoever they may,) by the use and occupation of the same by the said *Wilmington and Susquehanna Rail Road Company*, formerly called *The Delaware and Maryland Rail Road Company*, (taking into the estimate the benefits resulting to said owner or owners from conducting the said rail road through the lands and property of said owner or owners thereof) at the sum of six thousand dollars, current money—and the jurors aforesaid by their oath and affirmation aforesaid further say, that the quantity of or duration of interest in the said described lands and premises, so valued for the said *Wilmington and Susquehanna Rail Road Company*, (formerly called *The Delaware and Maryland Rail Road Company*,) shall be an estate in fee simple in the said lands and premises, to be held by the said *Wilmington and Susquehanna Rail Road Company*,) formerly called *The Delaware and Maryland Rail Road Company*,) their successors and assignees, forever. In witness whereof, the jurors aforesaid have hereunto respectively signed their names and affixed their seals respectively on the day and year aforesaid and at the place herein before written, &c. &c.

BENJAMIN F. MACHALL, [seal.]

Taken, signed, and sealed before and in the presence of
NOBLE PENNINGTON, sheriff of Cecil county.

TO JAMES SEWALL, Esquire, clerk of *Cecil* county court: I do hereby certify that in obedience to the warrant to which this return is annexed, I did on the receipt thereof, summon a jury of twenty inhabitants of *Cecil* county, not related to the parties nor in any wise interested, to meet on the land mentioned in said warrant on the nineteenth day of July, 1836, last, the day named therein for the purposes specified in the same; that on said day the whole of the said twenty jurors so as aforesaid summoned, did meet and were in attendance on the said land, and the parties being present in person or by agents, and four jurors being struck by or for each party, thereby leaving *Benjamin F. Machall, &c.* as the remaining twelve of said jurors, to act as the jurors of inquest of damages, who being by me severally qualified agreeably to the act of assembly in such case made and provided, proceeded to view the land, and to describe and ascertain the bounds thereof, the quantity of duration of the interest of the same, and the damages, to be by them valued, and reduced their inquisition to writing, which was signed and sealed in my presence by each of the said twelve jurors above named, and was by me attested, and which, so signed, sealed and attested, I now return to you, to be by you filed in your court, and when confirmed by said court, to be by you recorded according to law.

So answers, *Noble Pennington*, sheriff of *Cecil* county—whereupon the said *Wilmington and Susquehanna Rail Road Company*, by their attorney, file in court here, the following *caveat* and reasons, to wit:

The said Rail Road company objects to the confirmation of the inquisition in this cause, and prays that the same may be quashed, for the following reasons, viz:

1. Because the damages given by the jury are excessive, and greatly more than the real value of the injury done to the said *Joseph Condon*.

2. Because the jury have given damages not only for the land taken by the company—but also have given damages for supposed trespasses which might be committed on other

lands of the said *Condon* by the workmen and labourers employed by the said company.

3. Because the said jury have given a large sum in damages for the making of ways across the said rail road. Whereas the said company is compelled by the provisions of its charter to make suitable ways across the same at its own expense.

4. Because the said jury have given damages for imaginary injuries to the said *Condon* from the passing of rail road cars over the said rail road, when no such injuries can possibly arise from that cause.

5. Because in fixing the damages the jury ascertained the same by adding together their several estimates and taking the average by dividing the aggregate by twelve.

And the said *Joseph Condon* by *Richard C. Holliday*, Esquire, his attorney, filed in court here the following reasons for confirmation, to wit :

1. Because the amount of damages allowed by the jury in this cause are not excessive, and do not exceed the real damage sustained by the condemnation of the land of *Joseph Condon* for the purposes of the said rail road company.

2. Because the jury did not estimate any supposed damage for trespass, or for any other cause for which the jury were not entitled to assess an amount of damages sustained by the said *Joseph Condon*.

3. Because the jury did not give damages for cross-ways which the rail road company were bound to construct and keep open as alleged in the *caveat* of the rail road company.

4. Because the jury did not give damage for any imaginary injury, but only for such as they were fully satisfied *Joseph Condon* did sustain by the occupancy of his land and their condemnation of his lands as aforesaid.

5. Because whatever rule of estimating the damage in this case may have been adopted by the jury, *Joseph Condon* is not aware, but he is fully convinced that the amount of damage allowed for the condemnation of his land, is no

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greater than the just amount to which the said *Joseph Condon* is entitled in this case.

EXCEPTION.—At the trial of the *caveat* to the confirmation of the said inquisition, in addition to all the proceedings before set forth, the parties respectively offered proof to the court of the several allegations contained in their respective objections for and against said inquisition; but it being admitted by the *Rail Road Company*, that subsequent to the date of the said inquisition, the said company had occupied the land therein condemned, and had been engaged in constructing their road over and upon it, the county court (*Chambers, Ch. J. Hopper and Eccleston, A. J's*) for this reason refused to hear any testimony in support of the caveator's allegations, and confirmed the said inquisition. The appellants excepted.

The inquisition being confirmed, the Rail Road Company appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and SPENCE, Judges.

DORSEY, Judge, delivered the opinion of the court.

Before we examine into the correctness of the opinion of the county court, set forth in the bill of exceptions introduced into the record before us, a preliminary question presents itself for our determination, does an appeal lie to this court from the judgment of the county court in a case like the present. We are of opinion that it does not. There is no appeal expressly given to the court of Appeals, under the act of assembly, investing the county court with the power of reviewing and confirming, or setting aside inquisitions like the present. From the nature and course of their proceedings, this power of review is a fit subject for litigation in a county court, but is wholly inappropriate to the jurisdiction of this court. It is a special limited jurisdiction given to the county court, from the decision of which no appeal lies to any other tribunal. With as much propriety, might it be

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contended that appeals would lie to this court from the judgments of the county court on warrant appeals relating to the recovery of small debts.

The appeal in this case is dismissed.

APPEAL DISMISSED.

THE PLANTERS' BANK OF PRINCE GEORGE'S COUNTY *vs.*
THE FARMERS AND MECHANICS' BANK OF GEORGETOWN.—*June, 1837.*

The usage of banks in regard to the manner in which current deposits, and the proceeds of notes and drafts placed with them for collection are paid, not being in proof, nor heretofore proved and established in courts of justice, cannot be judicially known, or sanctioned as general mercantile usages, which are a part of the law of the land.

A usage established by proof, that current deposits made in a bank, and the proceeds of notes and drafts placed for collection, are to be paid to the depositor, upon demand, at the counter of the bank, would prevent the running of the act of limitations against such depositor, until payment of his claim had been refused, or some act done, with his knowledge, dispensing with the necessity of a demand.

Such dispensation would be furnished by the suspension of specie payments, and discontinuance of banking operations, by the bank, provided, those acts were known to the plaintiff, and from the time of such knowledge, the statute of limitations would begin to run.

Mere fiduciary relations between the parties to a suit, in respect to the matters in controversy, will not *per se*, prevent the running of the act of limitations. In a court of law there is no such bar to the operation of the act as *trusts*, otherwise than as shewing when the right of action accrued.

Though the indebtedness of the defendant, may be the result of a running account between the plaintiff and defendant, it is not necessary in an action for money had and received, that the plaintiff should produce the running account, and prove all the items thereof, but he may prove any isolated receipt of money by the defendant, and claim a verdict for the amount, unless satisfaction in some way of such receipt can be shewn.

APPEAL from *Prince George's* county court.

This was an action *assumpsit*, instituted on the 15th November, 1834, by the appellee against the appellant. The declaration, was for sundry matters and articles properly

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chargeable in account, &c. for money paid, laid out and expended, lent and advanced, had and received for the use of the plaintiff, and also for an account stated. Issues were joined on the pleas of *non assumpsit* and limitations.

1. At the trial of the cause, the plaintiffs, an incorporated banking institution in the *District of Columbia*, offered evidence of a balance due them in 1829, resulting from dealings between the plaintiffs and defendants, from January, 1828, to 1829, and then terminating; consisting of notes, checks and drafts, sent to each other reciprocally for collection, the proceeds of which when collected and paid, were placed by each, to the credit of the other, according to the course of dealing between them. The defendants then read to the jury the following letters, which it was admitted were written by the cashiers of the two banks :

FARMERS AND MECHANICS' BANK,
Georgetown, February 11, 1828.

DEAR SIR:—I have your favours of 7th and 8th inst. with enclosures. Our book-keeper is just at this time much engaged in the examination of accounts, but will take the first leisure moment to attend to yours,

J. J. STULL, *Cash'r.*

T. TYLER, *Esq.*

FARMERS AND MECHANICS' BANK,
Georgetown, February 16, 1828.

DEAR SIR:—I enclose you a statement of differences in our accounts, as they appear on our books, and the statements furnished by you from the time of the last settlement, in 1821, showing the different sums charged by us, and not credited by you, as also several items credited by you, and not charged by us, which you will please examine and report on them. In August, 1827, I find I have charged you with *Truman Tyler's* check, for \$50 drawn on *Planters' Bank*, but charged here, which I now enclose for our credit, your early attention to the subject will oblige,

J. J. STULL, *Cash'r.*

T. TYLER, *Esq.*

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FARMERS AND MECHANICS' BANK,
Georgetown, February 26, 1828.

DEAR SIR:—The enclosure in your favour of 23d inst. is received. On the 16th inst. I enclosed you a statement of differences in our account, and also *T. Tyler's* check for \$50, the receipt of which you do not acknowledge,

Yours, J. J. STULL, *Cash'r.*

T. TYLER, *Esq.*

PLANTERS' BANK,
Prince George's county, March 3, 1828.

DEAR SIR:—I have received your two favours of the 16th and 26th ult. with their respective enclosures. I have been utterly at a loss to account for the non-appearance of my check on this bank received in the latter, and for which you have a credit. Your statement received in the former, shall be attended to as early as possible, but inasmuch as it includes the transactions of our banks for more than seven years, and is involved in great obscurity, it will be a work of great labour to investigate it with accuracy, particularly as the person who acted as our book-keeper during the whole period is now absent from the bank, but is expected shortly to return. Upon first view of your statement of differences, I observed several errors, only one of which I will now state. On the 14th October, 1822, you say—*T. Tyler's* note of \$600—paid \$400—short \$200. Upon a reference to our correspondence at that time, you will find that prior to the note becoming due, I obtained your permission to pay \$400 at the maturity of the note, and to renew for the other \$200 for thirty days, and upon reference to the copy of our accounts furnished you, you will find that at the expiration of the thirty days, the balance of \$200, with discount thereon was paid, and that you are credited with the same. We have furnished you with copies of our account, from our first settlement to the present time; and in order to come to a fair and corrected settlement of our accounts, I am persuaded it will be necessary for us to have a full copy of your accounts from the same period. Being the only officer in the bank at this

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time, except the president, and having been confined to my bed for the last ten days, has prevented an earlier attention to your letter of the 16th ult. Yours,

T. TYLER, *Cash'r.*

J. J. STULL, *Esq.*

FARMERS AND MECHANICS' BANK.

Georgetown, March 8, 1828.

DEAR SIR:—I have your favour of 3d inst. I hope you will find less difficulty in adjusting our accounts, than you seem to apprehend. The discrepancies are numerous, but I hope on reference to your books and letters, you will be enabled without difficulty to trace them. Our accounts agree as far as we have been able to discover, with the exception of the errors furnished. It seems that your note was charged up (\$600) for the whole amount, when it was renewed for \$400, you afterwards credit us \$201 13 but we charge you only \$1 13 for the discount. If you cannot account for all the errors as stated by us, you will please report them, and we perhaps will be able to trace them here, and in that way be enabled to adjust the account without making out the whole account from our books. Yours,

J. J. STULL, *Cash'r.*

T. TYLER, *Esq.*

PLANTERS' BANK,

Prince George's county, March 21, 1828.

DEAR SIR:—I send under cover our remarks on your statements of differences in our accounts, as far as we have been able to trace them. Please to examine them, and give us the information requested. I enclose you for collection and my credit, *Sam. Sprigg's* bill on *Gen. W. Smith* for \$1,200. Yours,

T. TYLER, *Cash'r.*

J. J. STULL, *Esq.*

And also read the following resolution of the board of directors of the defendants.

August 28th, 1834.

Resolved by the board of directors, that the cashier inform the *Farmers and Mechanics' Bank of Georgetown*, that this

institution always has denied, and still does deny all indebtedness on the part of this institution to the said *Farmers and Mechanics' Bank of Georgetown.*"

The defendants then prayed the court to instruct the jury as follows :

1. That if the jury should be of opinion from the evidence, that the dealings between the plaintiffs and defendants terminated in the year 1829, and that from that time, or from an earlier period to the present, there had been no recognition by the defendants of a debt due the plaintiffs, but that, on the contrary, the defendants have refused to settle, or allow the claim asserted by the plaintiffs, that then the plea of the statute of limitations is a bar to the plaintiffs' action, and the verdict must be for the defendants.

2. That if the jury should be of opinion from the evidence, that the accounts between the plaintiffs and defendants have remained unsettled, and in dispute from the year 1829, when the defendants stopped payment, or from an earlier period, to the present time, and that within three years next preceding the institution of this suit, the defendants have made no acknowledgment of indebtedness to the plaintiffs, that then the plea of the statute of limitations is a bar, and the plaintiffs are not entitled to recover.

3. That if the jury should be of opinion from the evidence, that the defendants since the year 1829 or before, have failed or refused to settle accounts with the plaintiffs, though called upon so to do more than three years next before the institution of the present action, that then the act of limitations is a bar, and the plaintiffs are not entitled to recover.

4. That if the jury should be of opinion from the evidence, that the claim or any part of the claim of the plaintiffs on the defendants, arises from notes and drafts sent by the said plaintiffs to the defendants for collection, and which became due, and were collected more than three years before the commencement of the present action, that then, in relation to such portions of the plaintiffs' claim, the statute of limitations is a bar, and the plaintiffs are not entitled to recover.

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5. That if the jury should believe from the evidence, that from the year 1821, when the accounts between the plaintiffs and defendants were settled, to the year 1829, when their dealings ceased, and the defendants stopped payment, and discontinued banking operations, and that from the latter period, or before, or since, there has been no settlement of accounts, or recognitions of a balance due the plaintiffs, but on the contrary, the claim of the plaintiffs has been disputed, and the defendants have failed to settle the account, then the plaintiffs are not entitled to recover, the plea of the statute of limitations being a bar to their action.

All which instructions the county court (*Stephen, Ch. J.*, and *Key* and *C. Dorsey. A. J's.*) refused to grant. The defendants excepted.

2d EXCEPTION.—After the evidence which had been offered in the preceding exception, and which is to be taken as a part of this, the defendants proved to the jury by competent witnesses that the defendants stopped payment and refused to pay specie for their notes or claims against them on the 10th August, 1829, and suspended banking operations on that day: and that a copy of the following resolution of the board of directors, announcing that fact to the public, was published in the newspapers in the *District of Columbia*, *Baltimore*, and *Annapolis*, at that time, viz:

“August 10th, 1829, whereas the very general prevalence of reports injurious to the credit of this institution, have produced such an effect upon its circulation, and such incessant demands for specie, that in the opinion of the board it has become necessary, at least for a period, to suspend the redemption of its paper. In adopting this course the board of directors consider it their duty to assure the creditors of the institution, that the funds of the bank are in their opinion abundantly sufficient to discharge all its obligations, so soon as the same can be made available; and they also are justified in the belief that, the period when this can be effected is not far distant. The board likewise made known to the stockholders that so far as they can at this time determine of

the situation of the bank, they entertain a decided conviction, that there will not be ultimately a considerable loss. Indeed they are persuaded there will be none, because it is not believed that the amount of bad debts will be more than equal to the surplus profits. The board, therefore, whilst they earnestly advise the bill-holders and depositors to submit to no sacrifice, feel themselves perfectly warranted in holding out to the stockholders the prospect of full indemnity. It is in contemplation to appoint a committee to investigate carefully the affairs of the bank, and when the same shall be completed, a full exposition of its affairs will be laid before the public. Therefore, *resolved*, that until further notice, the paper of the *Planters' Bank of Prince George's county* will not be redeemed, and that the president cause this preamble and resolution to be communicated to the public, by inserting a copy in one or more newspapers in the *District of Columbia*, and the cities of *Baltimore* and *Annapolis*, and at the door of the banking house."

And thereupon they prayed the court to instruct the jury, that if the jury believe from the evidence in the cause, that the account between the parties terminated in 1829, and that the defendants in that year stopped payment, and refused to pay specie for their notes, and suspended ordinary banking operations, and that public notice of that fact was given in the manner stated in this exception, that then any balance which may have been due from the defendants to the plaintiffs ceased to be held by the former in a fiduciary character, and became a fit subject for a suit at law, and the act of limitations from that time began to run. The court refused to give the instruction as prayed. The defendants excepted.

3d EXCEPTION.—Upon all the evidence in the preceding bills of exceptions, which it is agreed shall be considered as incorporated in this exception, the defendants further prayed the court to instruct the jury, that if they should find from the evidence, that the last settlement between the plaintiffs and defendants took place in the year 1821, and that no settlement has taken place since, and that there has been no

admission of a balance due the plaintiffs at any time, that then the plaintiffs will only be entitled to recover, by shewing a balance in their favour upon the whole account commencing in 1821, when the last settlement was made, if the jury believe that in fact a settlement was then made; which instruction the court refused to give, but were of opinion, and so instructed the jury that, the plaintiffs are entitled to recover in this action, the moneys collected on the notes given in evidence by them, unless the defendants can shew satisfaction thereof, or an indebtedness to them on the part of the plaintiffs, in the course of the dealings which took place subsequent to the year 1821, or before, if the settlement then made was in any respect or particular incorrect. To which refusal of the court to give the instruction prayed, and to the opinion of the court as given, the defendants excepted, and the verdict and judgment being against them, they appealed to this court.

The cause came on to be argued before ARCHER, DORSEY, and CHAMBERS, Judges.

PRATT, for the appellants, contended :

1. That there was nothing in the relation which the parties bore to each other, or in the nature of their dealings, which prevents the application of the act of limitations to this case as to ordinary cases.

If the transactions constituted a trust, limitations were still a bar. In equity to prevent the operation of the statute, the trust must be a contingent one; in a court of law no such exception can be taken to the act. The statute applies at law whenever an action can be brought on the trust at law. The rule only applies to trusts, exclusively cognizable in equity. *Angel. on Lim.* 349, *Green's executrix vs. Johnson, et ux*, 3 *Gill and John*. 391. And although the transactions here might constitute a trust, or the money when collected considered in the hands of a fiduciary, still in a court of law the bar exists. The rule applies to all constructive trusts—to

banks as well as to individuals. The policy of applying it to banks is the stronger, as they have officers constantly employed to investigate and settle their accounts.

2. That if as a general rule limitations would not apply to dealings between banks, there are, nevertheless, circumstances in this case which take it out of the operation of such general rule, and make the plea of the statute a bar to the plaintiffs' right of recovery.

It would be difficult to show that the *Farmers and Mechanics' Bank* was a depositor with the *Planters' Bank*. The action was brought for collections. The dealings terminated in 1829. The balance arises from mutual dealings—not on claims sent from *Georgetown* to *Prince George's*. Each bank places the proceeds of collected notes to the credit of the other, though not as a depositor. A depositor has the right at any moment to call for his deposit. His right results not from mutual dealing, but from a deposit for safe keeping. The correspondence shows this a disputed claim: and no settlement appears since 1821. The accounts are admitted to be erroneous. The character of a deposit can no longer then be claimed for it, and the ground of an exception to the statute therefore fails. The act begins to run from date of the right of action. *Darnall's executors vs. Magruder*, 1 *Har. and Gill*, 439. If a demand was necessary in this case to found a right of action, it exists here. It is implied in all the correspondence. The necessity for it was superseded. There was a denial of the debt—a refusal to pay any thing, from which the act began to run.

3. If the appellant is in error on these points, and the case is not one to which the act of limitations would apply in a proper form of pleading, yet upon the pleadings as they stand, the plaintiffs cannot avail themselves of an exception from the operation of the statute.

Under the second exception, if a demand was necessary to enable the plaintiffs to sue in this case, the suspension of the bank, and notice to creditors of inability to pay, dispenses with a demand, and authorizes an immediate suit. *Law*

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Library, 71. Shutting up a bank, so that a demand thereat is impossible, is a declaration to all the world, that it will not pay, and demand is not necessary to enable a party to sue.

The prayer is, that failing in 1829—dealings ceasing—no indebtedness since recognized—then the jury may find the statute a bar. The appellees insist that, they know nothing of these facts, and that the statute had no application—but knowledge is clearly inferable from the facts which went to the jury.

Can the appellees under the pleadings take advantage of their alleged exemption from the statute of limitations? They have taken issue on the plea of the statute, and their declaration shows no exemption from the statute as a trust. The pleadings should state the facts on which an exemption is founded. 3 *Gill and John*. 391. Where there is a trust it should be so pleaded; the fact of trust should specially appear.

The appellees may say that no exception to the statute need be pleaded, but the savings in the statute itself, and where the exemption does not arise from the savings that it is matter of evidence. This, however, is against the principles of the decision last cited.

Where a fraud is discovered within three years, this is an exemption from the statute, though it contains no exception in regard to fraud, but the fraud must be specially replied. *Chit. on Con.* 313.

Upon the third exception he contended that the court erred in rejecting the appellants' prayer, and in the instruction actually given, upon the ground, among others, that the instruction assumes matter of fact which should have been submitted to the jury. *Farmers' Bank of Maryland vs. Duvall*, 7 *Gill and John*. 60.

C. Cox, for the appellees.

This is an action on the case instituted on the 15th November, 1834, by the appellees against the appellants, to recover a balance due the former, as a depositor with the

latter, and which the latter on the 28th August, 1834, refused to pay over.

The dealings between the parties as shown by the record, extended through several years, down to sometime in the year 1829, but the controversy presented to this court in the bills of exceptions, is limited to the proceeds of certain notes, drafts and checks, admitted to have been transmitted to the appellants by the appellees for collection, from January, 1828, to the year 1829; to have been duly collected by the former, and as collected carried to the credit of the other as deposits, according to the course of dealings between the parties.

Against this claim, the justice of which is established by the admission of the appellants of record, it sought in the court below to defend itself under the statute of limitations. This defence was overruled by that court, and their decisions on the several questions in which it was presented, are now brought by the appellants before this tribunal for review. It was a concession in the court below, as sufficiently shown by the bills of exceptions, that the ordinary relation between a bank and its depositor is strictly fiduciary, not admitting during its undisturbed continuance, an action at law, and so not within the operation of the statute of limitations. But it was supposed by the appellants, that this relation was terminated more than three years prior to the institution of the present action: 1st, by the operation of certain facts, offered as evidence of a failure, or refusal on its part to account with, or acknowledge indebtedness to the appellees; and 2d, by the suspension of the appellants in the year 1829, and these substantially are the only questions intended to be presented for adjudication to the court below, and actually adjudicated by that tribunal.

For the appellees it will be contended:

1. That the concession made in the court below, as to the ordinary relation between bank and depositor, cannot be now recalled, nor can that question be presented to the appellate tribunal for adjudication. But if jurisdiction of the question

be entertained, it will be contended that the law is as stated to have been conceded.

2. The mere *failure* to account or acknowledge indebtedness, cannot change the pre-existing fiduciary relation between the parties, so that at the end of three years from its creation, the statute of limitations can bar the *cestui que* trusts remedy.

3. The record presents no evidence of a *refusal* to account, on denial of indebtedness, prior to August 28, 1834.

1st. The correspondence incorporated in the bills of exceptions evidently refers to a distinct matter, not now in controversy, and if it referred to the same matter, would recognize instead of denying the fiduciary relation between the parties.

2d. The resolution of August 28, 1834, being the only additional testimony on this point, exhibited by the record, is not evidence of an earlier denial of indebtedness or refusal to account.

4. The resolution of August 10, 1829, or the fact of the appellants' suspension in that year, is not brought to the appellees' knowledge for three years or more, before this action was instituted, nor if known to the appellees, was its object or effect to change the pre-existing fiduciary relation between the parties to this action.

The first prayer admitted the fiduciary relation, and the defendants introduced certain facts to escape from its effect. It does not appear affirmatively that the fiduciary relation was disputed in the court below, hence its non-existence cannot now be relied on, and so long as it continued, no right of action at law accrued. When did an action at law accrue to the appellees? From that time the statute began to run, so long as the possession of the fund by the appellants was consistent with, and not adversary to the rights of the appellees, the fiduciary relations continued. This was broken by demand and refusal to pay. *Green vs. Johnson, et ux* 3 *Gill and John*. 395. Until demand no cause of action existed. This is like the case of a factor entrusted to sell the goods of his principal. *Kane vs. Bloodgood*, 7 *John. C. R.* 90, 122. In answer to this it is said, that the dealings

here constituted a simple contract debt payable on demand, and on which the statute operates at once. The case of *Darnall vs. Magruder*, 1 *Har. and Gill*, 439, relates to a debt of that description, but has no application here, it is founded on a precedent duty to pay. 1 *Chitty*, 320. Here the creditor must seek his debtor. The bank is not to seek the depositor. Payment is only to be made at the counter of the bank, the depository. It is like other cases of payments to be made at specified places. It is not a loan which carries interest. No interest accrues until refusal to pay. The use of the money is not implied. The depositor may claim at any moment. The use of the money is inconsistent with the obligation of the bank to pay, incidentally the bank may indulge in some use, but the contract disaffirms any use, and engages to pay on demand. A re-payment may be demanded immediately after the deposit. The argument from inconvenience may be relied on. But the banks are creatures of the legislature, they are established for public convenience—as safe depositories for disbursing officers—or trustees of the courts. Are these to be cut off after three years? Can the banks close their doors to such creditors after that period? It is argued that the original relation of the parties was changed more than three years.—The evidence is relied on for this. It is said, a failure to acknowledge the claim for more than three years creates a bar. As to refusal to account the record shows none until 1834. The time of the claim was from January 1828 to 1829. In February, 1828, the appellants transmitted an account to the appellees. The correspondence does not relate to a present claim; but to a prior account. The evidence does not include the whole correspondence, but it sufficiently shows that all differences in the accounts were reconciled, and nothing left open but dealings from 1828. The whole correspondence admits the fiduciary relations, and a mere difference in the state of the accounts cannot change that relation.

The resolution was not brought to the knowledge of the appellees. One of the parties sought by an adoption of a

resolution, and publication of it, to affect us with it. But we are only to be affected by actual or constructive notice—as by proof that the appellees took the paper in which the notice was published. Being correspondents, the appellees were entitled to special notice. The refusal of the court is justified by the absence of evidence as to this resolution. The object of the resolution of 1829, was not to change the relation between the bank and its depositors. It did not apply to depositors. It is supposed the Bank declaring itself insolvent stopped the former relation, and this without our knowledge. This would be a premium to dishonesty—a silent unknown resolution would work all the mischief. *Chitty on Bills*, 317.

The last instruction assumes no matter of fact. It does not decide that any money was collected. It assumes no definite sum, but such sum as was collected, leaving that to the jury.

J. JOHNSON, in reply.

1. There was nothing in the relation of the parties to each other, or in the nature of their dealings to prevent the application of the statute of limitations to any balance which might be due from one to the other. Nor is there any thing in the shape in which the question is presented by the record, which prohibits its discussion here.

The evidence and prayers in the first exception, raise the general question of the applicability of limitations to such a claim as the plaintiffs sought to recover. The prayers, to be sure, go further and place the defence upon narrower grounds than the circumstances of the case justified; but though the defendants thought proper to do this, it by no means follows, that they are not entitled to the benefit of the broader and more comprehensive ground, that independently of special circumstances, the plaintiffs' claim is barred by the statute.

In discussing this branch of the case, it is to be conceded, that the plaintiffs' claim is subject to the operation of the statute, and that the court would so have decided, if an appli-

eration for that purpose had been made to them; and the attempt is, to escape the effect of the bar, upon the ground, that the defendants did not present the general question, but rested their defence upon special and peculiar circumstances. But can such an attempt be successful? A party prefers a claim barred by limitations, which are regularly pleaded against it. At the trial, a variety of facts are proved, of a tendency to strengthen the defence, and then, because the defendants apply to the court to instruct the jury, that if they believe these facts, the plaintiffs are not entitled to recover, it is the duty of the court to refuse the prayer, and suffer the plaintiffs to obtain a verdict; although, even without those facts the plaintiffs would not be entitled to recover. In such a case, it is clearly the duty of the court to say, that whether these particular circumstances do, or do not exist, the action is barred by the statute, and the plaintiffs cannot recover. In proving the special circumstances detailed in the first exception, the defendants performed an act of supererogation, but this surely cannot deprive them of the benefit of the statute, if their case is of such a nature as to entitle them to it.

If the defendants are at liberty to discuss the general question of the applicability of the act of limitations to the plaintiffs' claim, what is there in the relation of the parties, or in the nature of their dealings, which exempts it from its operation?

It will not avoid the bar, to say that the money was held by the defendants in trust, for all trusts are subject to the statute, except those purely technical trusts, which are alone cognizable in equity. *Angel. on Lim.* 349, &c. *Kane vs. Bloodgood*, 7 *John. Ch. R.* 90. *Coster vs. Murray*, 20 *John. Rep.* 576, 610. If an action at law may be maintained, a trust is as much within the operation of the statute as a mere legal demand. Technical trusts, of which chancery has exclusive jurisdiction, are not within the scope of the statute, because there being no remedy at law, the analogies of the latter *forum* cannot be borrowed, and the act of limitations in terms, is not applicable to courts of equity. But where the

courts of law and equity have concurrent jurisdiction, the plaintiff cannot, by seeking the one or the other court, deprive his adversary of a protection given him by statute.

2. But supposing the general question to be against the appellants, and that apart from special circumstances, limitations would constitute no bar to the plaintiffs' claim. Are not the special circumstances of this case sufficient to constitute such bar?

The only ground upon which the plaintiffs can claim exemption from the statutory bar is, that no right of action existed, without a preliminary demand of the money at the counter of the defendants, for there can be no doubt, that the statute is in motion from the time of the accrual of the cause of action. *Darnall vs. Magruder*, 1 *Har. and Gill*, 439.

Conceding, for the sake of the argument, that this is the case, when money is placed in deposit with a bank, and the depositor has no reason to believe that his demand will be disputed when made; are there not many circumstances in this case which place this particular claim upon a totally different footing?

The dealings between the parties altogether ceased in 1829, and from that time down to the institution of this suit, repeated but fruitless efforts were made to adjust the accounts. The plaintiffs, in the correspondence of 1828, were distinctly informed, that the claim as asserted, was controverted, and of course they might at once have instituted this suit. To have made a demand at the counter of the defendants, after being told in advance, that they would not be paid, would, to say the least, have been a very idle ceremony, too idle, one would suppose, to be an essential pre-requisite to the commencement of a suit. And not only were the plaintiffs informed that their claim would not be paid, because it was disputed, but they were also advised that it *could* not be, in consequence of the general inability of the defendants to meet their engagements.

In August, 1829, more than three years before suit brought, the defendants suspended cash payments, and discontinued banking operations, and gave public notice thereof in the

papers of the day. This notice, it was in proof, was published in the District of Columbia, where the institution of the plaintiffs was situated, and though no express proof of notice to the plaintiffs was offered, there was abundant evidence from which the jury might have inferred it.

In view of all the circumstances of the case it is hardly possible to suppose, but that the plaintiffs had notice of the fact, and if they had, it would seem to be indisputable, that the right to sue was perfect without any previous demand.

Can there be a doubt, that from the time of this suspension and annunciation, the defendants were chargeable with interest upon all their debts, and if so, there must have been an immediate right of action. *Darnall vs. Magruder*, 1 *Har. and Gill*, 439. There was evidence tending to prove all the facts upon which the prayers of the defendants in the first and second exceptions repose, and if there was, they should have been granted. He further insisted, that if a previous demand of the defendants was necessary to the institution of a suit, there could be no recovery in this case, because there is no proof of such demand.

3. But conceding both those questions to be with the plaintiffs, and that their claim is not within the statute, either upon general or special grounds; still, the plaintiffs cannot recover upon the case as exhibited by the pleadings.

They have taken issue upon the plea of limitations, which admits its legal effect, and presents the single question, whether, in *point of fact*, the cause of action accrued three years or more before suit brought. *Green vs. Johnson*, 3 *Gill and John*. 389. *Blanch. on Lim.* 89. If the action did, in fact, accrue three years or more before suit, and there was no subsequent recognition or acknowledgment of indebtedness, the claim is barred upon the pleadings as they stand, no matter what the character of the claim may be. The plaintiffs should so have declared, as that the plea of the statute might have been demurred to, or else they should, by a special replication, have presented the grounds upon which they claim immunity from the statute. Having done neither, they have no

right to avoid the question *of fact*, which they have chosen themselves to try, and present a legal question not involved in the pleadings.

4. Upon the third exception he contended, that the court, in their instruction, assumed matters of fact which should have been submitted to the jury.

The statement in the first exception is, that the plaintiffs *gave evidence* merely of a balance due them, and of the collection of notes, &c. Yet the court instruct the jury, that the defendants did in fact collect, which, of course, precluded them from denying such collections, as they might otherwise have done, notwithstanding the plaintiffs' proof. It was the province of the jury to decide upon the proof, and to say whether it was credible or not. *Farmers' Bank of Maryland vs. Duvall*, 7 *Gill and John*. 45.

But there is a further objection to the instruction in this exception. The previous accounts between the parties were settled in 1821. From that time, down to 1829, there had been an uninterrupted series of dealings, and consequently in the adjustment of the accounts between those dates, all the transactions should be brought into view.

The plaintiffs ought not to be permitted to single out particular items of charge, and claim to recover upon them, when, perhaps, upon the whole account if exhibited, they would be brought in debt.

DORSEY, Judge, delivered the opinion of the court.

Had the usages of banks (the existence of which, the several prayers in this case made to the court appear to assume, and the argument on both sides impliedly yields, viz: that where a current deposit of money is made in a bank, in the absence of all special stipulation to the contrary, it is to be paid to the depositor upon demand at the counter of the bank, and that where a note or draft deposited in a bank for collection is paid, the net proceeds of the amount thereof is carried to the credit of the depositor, and is held by the bank collecting it in all respects as if it were a cur-

rent deposit of money) been proved to the jury, and submitted to their finding, it would materially influence the decisions of this court, in many of the determinations of the county court, which we are called on to review. But these usages, however well known and recognized by the community at large, and adopted in all their transactions with the banks, not being of proof in the record before us, nor heretofore proved and established in courts of justice, cannot be judicially known to us, or sanctioned as general mercantile usages, which are a part of the law of the land, and our adjudications on the acts of the court below, must be made as if no such usages had ever existed. In this aspect of the case, the county court were clearly in error in refusing the defendants' first prayer in the first bill of exceptions, the act of limitations being a conclusive bar to the action whether "the defendants have refused to settle or allow the claim asserted by the plaintiffs," or not. For the same reason the county court were wrong in their refusal of the defendants' *second, third, fourth, and fifth* prayers in the first bill of exceptions; although in the three former, the fact of a subsequent recognition by the defendants of the plaintiffs' claim within three years before the institution of this suit (which would have removed the statutory bar) was not submitted to the finding of the jury. There being no evidence offered of such subsequent recognition, the court properly withdrew that fact from the consideration of the jury.

To test the accuracy of the county court's refusal to grant the defendants' prayer in the second bill of exceptions, we will assume, as the prayer does, that the existence of the aforementioned usages of the banks was to be judicially recognized by the court, ought the prayer then to have been granted? We think not. Before the act of limitations commenced running against the plaintiffs, payment of their claim must have been refused by the defendants, or some act must have been done by the defendants (a knowledge of which is brought home to the plaintiffs) dispensing with the necessity of a demand of payment at the counter of the *Planters' Bank*.

Such dispensation is abundantly furnished by the acts of the defendants on the 10th of August, 1829. But were those acts known to the plaintiffs (without which knowledge the act of limitations does not commence running against them) is the question? The prayer of the defendants calls on the court to assume the fact of knowledge, and for that reason as the point was presented to them, they very properly refused the prayer. Although the facts submitted to the finding of the jury furnish strong evidence of the plaintiffs' knowledge thereof, yet they are not of that conclusive character to warrant the court in assuming the plaintiffs' knowledge, and in the withdrawal of the determination of that fact from the hands of the jury. But the court erred in not granting this prayer, because the fact of the existence of the banking usages referred to, not being in proof, could not enter into the consideration of the questions before them, and the act of limitations being a bar to the plaintiffs' action, whether the alleged acts of the defendants ever occurred or not, or whether the plaintiffs had a knowledge thereof or not, the finding of the facts submitted to the jury, could not interfere with the running of the act of limitations, and therefore the prayer of the defendants ought to have been granted. In our remarks upon this bill of exceptions, we wish it to be understood, that we by no means accede to the doctrine in the defendants' prayer, and urged in the argument of this cause, that mere fiduciary relations between the parties to a suit, in respect to the matters in controversy, *per se*, prevent the running of the act of limitations. There is in a court of law no such bar to the operation of the act of limitations as "*trusts*," otherwise than as shewing the terms of the contract between the parties, and time at which the plaintiffs' right of action accrued, and thus avoiding the statute by shewing that by the terms of agreement sued on, there has been no such lapse of time, since the right to sue commenced as would create a bar. See the case of *Green, ex'r of Green vs. Johnson, ex'r*, 3 *Gill and John*. 391. From the views we have taken of this matter of trust, it is unnecessary for us to

determine, whether conceding it to be an available defence against the act of limitations in a court of law, the plaintiffs could avail themselves of it in the present state of their pleadings.

Giving to the opinion of the county court in the *third* bill of exceptions, that construction to which in fairness we think it entitled, we see in it nothing of which the defendants have any just ground to complain. To obtain a verdict the plaintiffs were not bound to produce their running account with the defendants and prove all the items thereof, and claim nothing but the balance thus appearing to be due, but they were at liberty to prove any isolated receipt of money by the defendants and claim a verdict for the amount thereof, unless in the language of the court below, "the defendants can shew satisfaction thereof, or an indebtedness on the part of the plaintiffs, in the course of the dealings, which took place subsequent to the year 1821, or before, if the settlement then made was in any respect or particular incorrect." By this instruction the court do not mean, as has been supposed, to confine the *Planters' Bank* exclusively to testimony offered by itself; but it may take advantage of the testimony adduced by the plaintiffs, to shew the balance of the accounts between the parties from January 1828 to 1829. The rejection of the defendants' prayer in the third bill of exceptions meets our concurrence.

We concur with the county court in their opinion and instruction given to the jury, and in their refusing the defendants' prayer in the third bill of exceptions; but dissenting from their refusals to grant the defendants' prayers in the first and second bill of exceptions, we reverse their judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

E. and T. B. Hall vs. Belt.—1837.

ELIZA HALL AND T. B. HALL, *Executors of R. T. HALL*
vs. EDWARD W. BELT.—June, 1837.

A bond given to a sheriff by his deputy, the penalty of which was expressed to be, in "current money of the *United States*," is a valid and binding instrument, and a motion in arrest of judgment upon the ground that no such currency is known to the laws overruled.

Poundage fees due a sheriff, may, after the return of the writ be collected, as other officers' fees, under the act of 1779, ch. 25, and its supplement.

It is not necessary that officers' fees should be sent out for collection, in the year next after the performance of the services, and since the act of 1822, ch. 219, they need not be delivered at any particular period of the year.

APPEAL from *Prince George's* county court.

This was an action of *debt* commenced on the 25th May, 1833, by the appellee against the appellants, and was founded on the bond of *William Hall*, principal, and *Richard T. Hall*, surety, bearing date the 27th May, 1829, acknowledging themselves bound unto the appellant "in the full and just sum of ten thousand pounds current money of the *United States*." The condition of the bond was as follows :

Whereas the above named *Edward W. Belt*, being sheriff of *Prince George's* county, in the state of *Maryland*, hath deputed, ordained, constituted and appointed the above bound *William Hall*, one of his deputy or under sheriffs of said county, to serve in the said office of deputy or under sheriff within the following lines and bounds, to wit : beginning at, &c. From the date hereof, until he shall be duly and legally discharged by the said *Edward W. Belt*, or until the expiration of the term of office of the said *Edward W. Belt*. That if the above bound *William Hall*, do and shall well and faithfully execute the same office, or appointment of deputy or under sheriff in all things appertaining thereunto, and shall also render to the said *Edward W. Belt*, on the first Monday in each and every month ensuing the date hereof, or oftener if required, a just, true and full account of all fees, public dues, fines, forfeitures and amercements, against all and every person or persons residing, inhabiting or being within the lines and bounds aforesaid, and which shall be placed or offered to be placed in the hands of him, the said *William Hall*, by the said *Edward W.*

Belt for collection, and shall also well and truly pay unto the said *Edward W. Belt*, or to his order or assigns, on the first Monday in each and every month as aforesaid, or oftener if required, all and every sum or sums of money by him, the said *William Hall*, received as deputy or under sheriff aforesaid, and shall also well and faithfully execute and return all writs, process and warrants to him delivered, or offered to be delivered, against all and every person or persons residing, inhabiting or being in the lines and bounds aforesaid, and shall also pay and deliver to the said *Edward W. Belt*, or to the person or persons entitled to receive the same, all sum or sums of money, tobacco, goods, chattels or property by him levied, seized or taken, agreeably to the directions of the writ, process or warrant, under which the same shall have been levied, seized or taken, and shall also keep and detain in safe custody or deliver into the public jail of the county aforesaid, all and every person or persons who shall be committed to the custody or care of him, the said *William Hall*, or by him arrested or taken in execution, or who shall be committed for want of bail, without suffering them or any of them to escape or depart from his custody, and shall also pay and satisfy, save harmless, and indemnify the said *Edward W. Belt*, his executors and administrators, from all fines, defaults, amercements, judgments, loss and damage whatsoever, which shall or may be imposed, rendered against, suffered or sustained by the said *Edward W. Belt*, as sheriff of the county aforesaid, for and concerning the neglect, default, not executing, wrongful execution, or detention of any writ, process or warrant, and of and concerning all escapes of all and every person or persons that shall be arrested or taken in execution by the said *William Hall*, and of and concerning the non-payment or non-delivery of any sum or sums of money, tobacco, goods, chattels or property by him levied, seized or taken, and of and concerning the non-payment of all, or any public dues, fines, forfeitures and amercements, by him the said *William Hall* collected and received, or which he ought to have collected and received,

and shall also well and faithfully render to the said *Edward W. Belt*, his heirs, executors and administrators, when thereto required, a just, full, and true account of all matters and things that shall and may be done and executed by him, the said *William Hall*, in virtue of his said office or appointment, and shall in all things well and faithfully execute the said office or appointment of deputy or under sheriff aforesaid, then the above obligation to be void, &c.

The defendants pleaded performance generally by *William Hall*, the deputy, and after an assignment of several breaches by the plaintiff, issue was joined on the rejoinder of the defendants, which alleged that, said *Hall* did deliver and render to him, the said plaintiff, a true and just account of all moneys which he, the said plaintiff, authorized him, the said *William Hall*, to collect and receive, as deputy collector and sheriff of that part of said county, mentioned and described in the writing obligatory aforesaid, and he the said *William Hall*, before the day of the issuing of the said writ in this cause, did pay to him the said plaintiff, all sums of money by him collected and received as aforesaid, and all sums of money which he the said *William Hall*, by law, and his duty as deputy sheriff and collector, was obliged to collect and receive, according to the form and effect of the condition of the writing obligatory aforesaid, to wit, at the county aforesaid.

The jury found as to the issues between the parties aforesaid within joined, that there was due and owing from sundry inhabitants of the said several parts of the county, particularly mentioned and described in the said replication mentioned, the said several sums of, &c. in manner and form as the said plaintiff in his replication aforesaid above hath alleged—and as to the second issue between the parties aforesaid within, likewise joined, the jurors aforesaid, further say, that he the said *William Hall*, was authorized and empowered and entrusted to demand, collect, and receive, and that the said *William Hall* did demand, collect, and receive the aforesaid several sums of, &c. in manner and

form as the said plaintiff in his replication aforesaid above hath alleged, and they do find the sum of \$1,945 52 current money, really and justly due to the said plaintiff upon the writing obligatory aforesaid.

The defendants moved in arrest of judgment, and insisted that the verdict is insufficient and erroneous, and that the same verdict may be set aside. This motion the county court overruled.

EXCEPTION.—At the trial of this cause the plaintiff proved to the jury that he had been elected high sheriff of *Prince George's* county, in October, 1827, and that he was duly qualified, and acted as sheriff for the three years immediately succeeding his election. He also proved, that *William Hall*, the principal in the bond on which this suit is brought, was acting as his deputy on the day of the date of his said receipt, in consequence of said appointment, and then offered in evidence to the jury, a paper purporting to be a list of fees which had accrued to him as sheriff on executions in the year 1828, with a receipt thereto attached, admitted to be signed by the said *William Hall* in the words and figures following, to wit: "Received on this 19th day of May, 1830, of *Edward W. Belt*, sheriff of *Prince George's* county, the several accounts of fees corresponding with the aforegoing list of fees, to be by me collected agreeably to law, and paid over to said *Belt*."

Whereupon, the defendants prayed the opinion and direction of the court to the jury, that they were not legally liable as the executors of the surety of said *Wm. Hall*, for fees which had accrued to said plaintiff as sheriff, on executions in 1828, and which had been placed in the hands of the said *Wm. Hall*, a deputy of the plaintiff, in May, 1830, which opinion and direction, the court (*Key and C. Dorsey, A. J's*) refused to give to the jury, but were of opinion, and so directed the jury, that the said list of fees was competent proof to the jury, although they had accrued in 1828, and had been placed in the hands of the said *William Hall* in 1830. To

E. and T. B. Hall vs. Belt.—1837.

which opinion and direction of the court the defendants excepted.

The verdict and judgment being for the plaintiff, the defendants appealed to this court.

The cause was argued before ARCHER, DORSEY, and CHAMBERS, Judges.

PRATT, for the appellant, contended :

Upon the motion in arrest of judgment that, the penalty of the bond being in no known currency, "pounds current money of the United States," and which had not been reduced into any known currency by any form of averment, could not form the basis of a judgment in the money of this state. That any defect in the bond fatal to a recovery might be urged successfully in arrest. The case of *Sprowle vs. Legge*, 8 *Serg. and Low.* 11, establishes that foreign money must be averred to be of some value. Some equivalent in domestic money, and as it relates to Irish currency in an *English* court, is decisive of the question of pleading. The true question is, is the alleged currency of any known value. That averred is just as vague, as if it were one thousand without more specified.

Upon the exception, he contended, that the deputy was only bound for such fees as the sheriff could confer on him the official power to collect. If the act of 1779, ch. 25, sec. 11 and 18, refers to poundage fees of sheriffs, when the deputy received them in May, he had no authority as sheriff to collect them. If the terms, all officers, include the sheriff, he is to be regarded as all other officers, and these by the 11th section, are authorized to send out their fees but once in every year, and that between 1st January and 1st May. The power to execute for fees exists only with reference to the 11th section.

The act of 1788, relates only to the last year of a sheriff, and to fees delivered to him according to law. All officers collecting fees by execution must conform to the 11th section

of the act of 1779, ch. 25. This act was intended for the convenience of the people; and the officers bound to send out all fees intended to be so collected. This it is supposed includes the sheriff. The sheriff in this case did not send out his fees within the year of their accrual, and the defendant as deputy, could not execute for them, neither on property nor on the person: consequently as the deputy was not armed with the power designed by the bond, the security is not responsible for his default. But the sheriff is not within the 11th section. The more correct rule is that it only applies to those who are to deliver fees to the sheriff.

Then as to poundage fees, who is to pay them? and how do they accrue? They are for levying executions, and are to be paid by defendants. They attach on the levy. The act directs his compensation for levying, and that the amount due on judgments shall be marked on back of executions to ascertain fees by. The sheriff has a right to control an execution so far as to collect his fees. If so, did the security intend to stipulate for the performance of more than those duties which, as deputy he could rightfully discharge for the sheriff. On this construction of the contract, there is an end of the case, for the true question is, could the deputy collect those fees by execution. The fees were placed in his hands in 1830. The bond expired in 1830, and the deputy had not time to collect by warrant or suit at law.

The act of 1833, has no application. It merely relates to the plea of limitations. The act of 1836, ch. 73, is a supplement. The exception taken below merely relates to fees due on executions and on this question, the instruction was erroneous.

C. C. MAGRUDER and A. C. MAGRUDER, for the appellees.

The question on the motion in arrest, is whether the bond is a nullity. It is executed by a deputy to his principal sheriff, to perform duties in *Maryland*. Such is the nature of the contract. He is to be compensated in *Maryland*, and it would seem to follow, in the current money of *Maryland*.

This is denied by the appellant, because the language of the penalty is current money of the *United States*. If these words were omitted, the bond is still valid. Why sufficient to say current money, and why from that infer money of this state? Because the contract is to be performed here. This shows the intent to pay here. This authorizes the insertion of necessary, and the rejection of unnecessary words. The covenant must be construed most favourably for the covenantee. 1 *Com. on Con.* 25, 26. *Harper vs. Hampton*, 1 *Har. and John*. 672. *Howard vs. Rogers*, 4 *Har. and John*. 278. *Lyles vs. Lyles, ex'rs*, 6 *Har. and John*. 273. *Laidler vs. State use Hawkins*, 2 *Har. and Gill*, 277. 8 *Serg. and Low*. 11. 1 *Saund. P. & E.* 321. The plaintiff declares for £10,000 current money. There is oyer of the bond and condition. The defendant's plea of performance admits he was bound to pay unless he has performed. It is only by performance he can vacate the bond. Courts are not appointed to vacate instruments, but to make them valid. They make good grammar of bad and transpose language, insert words where necessary—*ut res magis valiat quam pereat*. Extrinsic words not necessary to show intent rejected: hence, the motion in arrest was properly decided.

In the consideration of the exception we contend, that the act of 1779, does not forfeit fees unless collected every year. Sometimes fees were placed in the hands of officers at so short a period before the termination of their offices, that it was impossible to collect them. The act of 1822, ch. 219, repealed a part of 1779, and allowed a further time before the process of execution should be resorted to, and the deputy in this case could have enforced by execution if that was necessary, under the act of 1822. The deputy having that power, remains liable. But it is said, that the provisions of the act of 1779, were not enacted for the benefit of the sheriff, and he could not so exact his poundage fees, which are paid on collection of the judgment—but that he has the remedy of holding the defendant's person answerable, or recovering them by action on the case. Practice and usage

gives the sheriff a double remedy for poundage fees, and the sheriff is to proceed for the recovery of his own fees as other officers. The only distinction is, that he has his account in his own hands. They are fees due to an officer and he may proceed under the act.

In this case the plaintiff assigns his breach for non-payment of money due him for fees placed in his deputy's hands. The rejoinder is that the deputy rendered an account and paid the plaintiff. This is the issue. The defence relied on, arises, from the idea, that the fees were collectable the first year and first year only. The universal practice is to send them out from year to year until paid. Such was the law until the act of 1833, ch. 258, put a limitation of time on the general right.

CHAMBERS, Judge, delivered the opinion of the court.

We do not think the appellant has sustained the objections taken to the judgment in this case.

The bond is unskilfully worded ; but its import cannot well be mistaken, or its meaning doubted, either by a man of plain sense, or a professional man. The established currency of this state, until within a few years, was in pounds, shillings, and pence, and the penalty of most of our office bonds in the forms set out in the statutes requiring them, will be found expressed in pounds. The contract is between citizens of the state, in reference to a duty to be performed in the state, and we think all the rules of construction, require us to see, and enforce the obvious intention of the parties, and would do so, even if it were not the case of a party claiming against his own words of alleged doubtful import. The motion in arrest of judgment, we therefore think, was rightly disposed of by the court.

The exception raises the question, whether poundage fees due to a sheriff, may after the return of his writ, be collected as other officers' fees, in virtue of the act of 1779, *ch.* 25, and its supplement ; a question which we think, must be decided affirmatively, whether we be governed by the letter or the

spirit of the act, or by the uniform practice throughout the state from the passage of the law to this time.

The direction not to send out fees, more than once in each year; whether designed for the necessary security of the sheriff, and to avoid the necessity of his perpetual occupation in distributing small accounts for fees, and collecting their amount, or for the protection of the citizens from the annoying demands continually repeated, of the very small sum in which they are generally due, will not be disobeyed by sanctioning the law declared in this exception. We cannot perceive that either reason will demand that the fees should be sent out, in the year next after the services were performed. The act of 1833, *ch.* 258, confirms what might otherwise have been said without doubt, that the practice in this respect also, has conformed to this construction.

It being no longer necessary, since the act of 1822, *ch.* 119, that the fees should be delivered at any particular period, there can be no reason why the deputy sheriff should not have proceeded to perform his duty, in respect to their collection. If any necessary cause why he could not collect them, could be shewn to the jury, they would under the sanction of the court, have considered its fair and just weight. But in the meantime, the receipt of the deputy for such fees, was competent proof to the jury, and as *prima facie* evidence sufficient in the absence of any countervailing proof, to render the said deputy, or his sureties, or his or their representatives, when sued on his bond, legally liable to the sheriff for the damages sustained by the non-performance of his the deputy's duty.

JUDGMENT AFFIRMED.

Delaware and Maryland Rail Road Co. *vs.* Stump.—1837.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE
DELAWARE AND MARYLAND RAIL ROAD COMPANY *vs.*
JOHN STUMP.—*June, 1837.*

The grant of a several fishery, in a public navigable river, cannot be presumed from the mere uninterrupted use and enjoyment of the right of fishing for more than twenty years.

If such presumption can be made at all, from the fact of such use and enjoyment, it must be shown to have been in exclusion of the right of others, and the absence of an averment to that effect, in a bill praying for an injunction to protect such right, was held to be fatal to the complainants' case.

Though the grant of a right to erect wharves, and employ steamboats, if destructive of the paramount right of general navigation and fishing, may be void; the remedy is not by injunction, which is only applicable to special injuries in violation of private rights. Public grievances are not to be redressed by individuals at their own suit.

Appeal from Chancery, from an order granting an injunction, and an order refusing to dissolve it on motion, under the act of 1835, *ch.* 340.

On the 13th September, 1836, *John Stump*, of *Cecil* county, by his bill complained, that his father was seized and possessed in fee, under a patent of the state, of a valuable tract of land at the mouth of the *Susquehanna* river, and established upwards of twenty years, certain fisheries thereon, and at which large quantities of shad and herring were annually taken by seines hauled over certain portions of said river; that complainant is the devisee of said tract, and in possession of all its rights and privileges, and has used and enjoyed the same, that on the 2d March, 1811, *John Stump*, the father, leased to one *Martha Coffield*, for the term of ninety-nine years, with covenants for renewal, eight acres of said estate, binding on the public road leading from the said river to *Charlestown*, and along the said river, according to a plat exhibited with the bill; that immediately below this leasehold, one of the fisheries of the complainant is situate, the haul of the seine from which, extends along and above the shore of the said lot, and over to the bar, making into said river from *Watson's Island*; that owing to the rapidity

and strength of the current of said river, a seine cannot be laid out and hauled from said fishery, in any other direction, than the one indicated on the plat by dotted lines, and that complainant and those under whom he claims, have so used, possessed, and enjoyed the said haul without interruption, and been always accustomed so to lay out their seines for upwards of twenty years, that the said rail road company have recently professed to have purchased the said leasehold estate of *Coffield*, and have located the line of their road over the same, and have laid out, and are now erecting a wharf from the shore, where the line of their said road terminates, into the *Susquehanna river* which said contemplated wharf, is designated on said plat; that the river is 240 perches wide at the point where the said wharf is to be erected, that it is 94 perches from the *Cecil* shore at said point, to the opposite shoal or bar, formed in said river from the lower end of *Watson's Island*; that the said wharf extends 49 perches into said river, being more than one-fifth of the whole width of said river, and exceeding half its width from the *Cecil* shore, to the bar formed from the lower end of *Watson's Island*; that the said wharf will encroach about 250 feet on the channel of said river, which flows between *Watson's Island* and the *Cecil* shore, and extends that distance further, than is necessary to admit of the safe and easy approach of any vessel navigating said river, or which said rail road company can desire to employ for the purpose of crossing the said river, if they have any authority to establish a ferry at said river, or to place any fixture below the high-water mark in said river, which the complainant denies, and he shows that said wharf when constructed, will be an encroachment on the rights of navigation, and an injury thereto, which said company have no authority to interfere with.

And the said bill further alleged, that prior to the act of 1835, *ch.* 168, persons owning lands on the margin of the navigable waters of this state, had no lawful authority to erect wharves, so as to encroach on the streams below high-water mark, and that the said statute has conferred the right

on the proprietors of fee simple estates, with an express saving in favour of the rights and interests of navigation and fishing; that the company have no assignment from *Coffield*, and are not the proprietors of the fee, from which they are constructing said wharf, but that the same is vested wholly in complainant; that said wharf will extend across about one-half the haul of his seine from his fishery, and render it impracticable to fish the same as heretofore, and that it will wholly destroy his fishery, which is worth fifteen thousand dollars; that he owns other valuable fisheries a small distance below the one before mentioned, and has owned them for upwards of twenty years, which the erection of said wharf will tend to injure; that such obstructions create deposits of sediment and mud, and tend naturally to fill up the shore, make flats of mud and destroy fisheries.

The bill further charged, that the company had no authority to ply a ferry boat across the river, and that the wharf under construction was in fact a bridge, extending more than half the distance across the eastern branch of the river, is not necessary nor indispensable for any legitimate purpose within the charter powers of said company, and is a device to narrow a passage across the river without authority, to the injury of your orator and the public; that any great destruction of the paramount interest of general navigation and fishing is void; and the bill then claimed damages for the injury about to be inflicted on complainant's rights. Prayer for an injunction against the company, to forbear from making, constructing, or completing the said wharf as laid out from *Coffield's* lot, or from using it, or placing obstructions in the river, and for a summons for the company, and *subpœna* for the president and directors thereof, and for general relief.

The complainant filed a plat, and a proven statement of a surveyor, verifying its courses and distances.

On the 13th September, 1836, the chancellor (*Bland*) granted the injunction, with liberty to the defendants after filing their answers, to move for a dissolution on ten days' notice to the plaintiff or his solicitor.

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The answer of the rail road company averred its incorporation by the legislature of *Maryland*, to construct a rail road from the dividing line between the states of *Delaware* and *Maryland*, to some point on the *Susquehanna river*, and to erect all needful buildings, wharves, warehouses, and other edifices requisite for the business of the said company, and also to establish a line of steamboats between the cities of *Baltimore* and *Philadelphia*, in connection with said rail road, and referred to the act of 1831, *ch.* 296, and its supplements. The answer admitted the construction of the wharf, at the place designated in the bill, but denied that it was unnecessarily extended into the river. It admitted that the company had not the title to *Coffield's* lease, but had made arrangements to procure it, and also admitted, that complainant was owner of the fisheries as charged, but insisted, they were so far below the wharf and ferry, that any injury to them from navigating the river was imaginary. All consequential injuries from deposits of sediment, &c. were also denied; that the complainant's fishing right was to be enjoyed contiguous only to his possessions, which the wharf did not interfere with, and his common right of fishing did not authorize this proceeding. The company admitted their design to use a steamboat in connection with the rail road, and the wharf erected for that purpose, but denied its extension to be greater than requisite to procure the necessary depth of water for a steamboat of the proper construction. The defendants denied that the wharf would injure the navigation of the river, and insisted, that if the spawn of the fish should be destroyed by the steamboat, it was an injury for which the complainant had no redress; that the steamboat and wharf were such, as according to the judgment of skilful engineers, were necessary for the convenient and free use of said rail road; that for any injury resulting from the navigation of the river the complainant cannot claim damages; that the habit of laying out seines in oblique directions from the shore, confers no several right of fishery, and that in public navigable rivers, the right of navigation, is paramount to that of fishery.

After the filing of the answer, the company by petition prayed for the hearing of a motion, to dissolve the injunction at an early day, but the chancellor being of opinion that his original order had sufficiently provided for that motion, dismissed the petition with costs.

Afterwards it was agreed, that the motion should be heard on the 14th October, 1836 ; and the complainant then filed various exceptions to the answer, insisting that the injunction should not be dissolved, nor until the president and certain directors of the company under *subpœna* by the bill, had also answered with the company.

On the 14th October, the chancellor continued the injunction until final hearing, or further order—and directed that the exceptions should stand for hearing, on the 15th November: Whereupon, the rail road company brought this appeal.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

OTHO SCOTT, for the appellant.

The complainant claims :

1. For an injury to a public river, an obstruction to the right of navigation.

2. For an injury to his private fishery.

1. Can the complainant obtain an injunction against a general nuisance. This is only remedied by a public prosecution, as an infraction of a public right Injury to navigation is not a ground for an injunction.

I shall consider the case on the ground of injury to private rights.

The act of 1834, *ch.* 281, *sec.* 4, confers on the company power to erect wharves. It confers all powers needful and requisite for the company. The power to connect the rail road and steamboat lines, incidentally confers the power of constructing a wharf. They must be brought to some point of contact. They must unite. This is apart from the ex-

press power, so far as the right of navigation is concerned, the legislature has granted it, and it is valid, unless their power is denied. A wharf is generally established to facilitate navigation. If defendants are authorized to construct it, it is no ground of complaint, that they have done so. The legislature has a right to control the public right of navigation. This is done in so many cases of canal and rail road companies, that practically the right is not disputed. Such an act is valid in the legislature. *Hooker vs. Cummings*, 20 *John*. 90. The legislature may delegate this power, and no injunction is obtainable for obstructions to navigation in a case like the present.

The only other question raised by the bill is, has the complainant set forth a several right of fishery, or can it be claimed in the public waters.

At common law, there was, and is, a common right to fish in public rivers. How did the complainant get the right to fish? No such right is acquired, unless from the legislature. The grant of soil adjacent to public waters, does not grant a several right of fishery. This right must be expressly granted. *Warren vs. Matthews*, 6 *Mod*. 73. *Hamer vs. Raymond*, 1 *Serg. and Low*. 266. The right here is claimed, upon what might be evidence of a right of several fishery. But the complainant should have stated his several right as acquired, and in the legitimate mode. The mere claim does not confer it. No right springs from twenty years use of a public navigable river. It is not like the use of a private way, where the right is presumed in lieu of an invasion of the private right. The idea is, that user is sufficient to deprive one of a public right. But in this case, the user encroaches upon no one, there was originally no violation of law. The party was only pursuing a common right. *Chalker et al vs. Dickinson et al*, 1 *Con. Rep*. 382. *Vooght vs. Winch*, 2 *Bar. and Ald*. 662. The complainant then shows no several right of fishery.

Has the legislature then a right to erect a wharf, which interferes with a common right of fishery.

The right of navigation is paramount to the right of fishery, which gives the right of making wharves. The paramount right gives the power to sustain it by various improvements. *App. to Angel*, 110, 94. *Harmond vs. Pearson*, 1 *Camp.* 517. The right of fishing is subordinate to the right of navigation. The object of the law is to facilitate navigation, to navigate with steamboat, the modern improvement is no legal interference with the right of fishing; as to piscarian rights assuredly twenty years user, is evidence of a grant. Then would the conversion of all such rights of the state into several rights, vary the rights of navigation? These would still remain. The soil of navigable water covered by it, may be granted, but the right of navigation still remains, as also that of fishing. *Browne et al, Lessee vs. Kennedy*, 5 *Har. and John.* 196. All private rights of soil and fishery, are subordinate to the rights of navigation. Buoys may be erected within the lines of a several fishery covered by navigable waters. The private right in this case is not a perfect but a modified right, liable to modifications; obstructions may be removed to improve navigation. Channels may be deepened and varied and fishing apparatus destroyed. In some cases unnavigable rivers are controlled, and navigation improved, by interference with private rights. The character of our American rivers, where there is no tide, no flux or reflux, which according to the common law would make the *Ohio* a private river, is affected by these principles, and the rights, in these waters are subject to modification.

The answer denies the right of a several fishery, and the plat shows how the right claimed has been exercised. If a right of several fishery is appurtenant to the shore, it is limited by the extent of the proprietor's possessions. The right claimed here exceeds the shore. It is in front of the shore of another, and not from a right line to the middle of the river, but on a diverging line covering double his extent of shore.

The abuse of the channel is denied, and as the channel has to be passed by the steamboat of the company, there is

no inducement to extend the wharf beyond the necessary distance.

A grant binding on a public river does not confer any right of soil below low water mark, on private rivers the right extends to the middle of the stream. The soil covered by navigable waters was in the king: the complainant's tract is said to be bounded by the *Susquehanna river*.

If the answer on this motion is taken to be true, it is a negation of every fact on which the complainant could claim an injunction. The right to fish, the unlawfulness of the wharf, and its unnecessary extent, are all denied.

An exception has been taken to the answer that it is not sworn to: the seal of the corporation is as effectual as the oath of other defendants: if not so it is out of the power of a corporation to put in an effective answer to an injunction bill, for where matters are not within the private knowledge of the officers of a corporation they are not properly parties. *Haight vs. Proprietors of the Morris Aqueduct*, 4 Wash. C. C. Rep. 600. *Angel on water courses*, 99, 211. *Weld vs. Hornby*, 7 East. 195.

H. STUMP, and A. CONSTABLE, for the appellee.

The counsel for the appellee propose to examine the order granting the injunction, and the order overruling the motion to dissolve it, in conjunction, under the impression that the case as presented by the record, shows that both orders rest upon the same facts: and in support of this view they will contend:

1st. That no answer has been filed which the court can regard, upon the motion to dissolve; and

2d. That if the answer of the corporation is considered, it does not contain a sufficient denial of the allegations upon which the injunction was awarded to entitle the defendants to a dissolution.

This bill was exhibited against the *Wilmington and Susquehanna Rail Road Company*, James Canby, its president, and Matthew Newkirk, and David Wilson, the only two of

its directors known to the complainant—process is prayed against them, and *Canby*, *Newkirk*, and *Wilson* are required to answer upon oath. The only answer filed is by the corporation and that under their common seal merely.

The object of the complainant was to obtain a discovery under oath, as to the truth of the allegations contained in his bill, and with that view he made *Canby*, *Newkirk* and *Wilson*, defendants. There was no other mode by which he could compel such a disclosure, the corporation having the right to answer under their common seal. An officer or agent of a corporation, who is made a party to a bill seeking a discovery in regard to the acts of the corporation of which they are officers or agents, is bound to file a sufficient answer under oath. *Wych vs. Meal*, 3 *Peere Wms.* 310. *Dummer vs. Corporation of Chippenham*, 14 *Vesey*, 245, and 1 *Page's Ch. Rep.* 100.

The complainant has taken every legal precaution then, by resorting to the only means that could entitle him to an answer under oath, and yet while such answers are purposely withheld, a dissolution of the injunction is sought upon the answer of the corporation alone, without other evidence of the verity of its contents than that which its official seal furnishes. Such an answer cannot be allowed any influence upon the decision of the motion to dissolve. It has no other effect than to put in issue the matters in controversy like the general issue plea at law, and does not upon final hearing require the evidence of two witnesses, or of one corroborated by pregnant circumstances, to rebut it. *Union Bank of Georgetown vs. Geary*, 5 *Peters' Rep.* 111.

The corporation asked a hearing of the motion on their answer alone, with full knowledge that the complainant sought a discovery through its agents under oath. The prayer of the bill for *subpœnas* to compel its officers to answer upon oath, evidenced the complainant's unwillingness to abide by statements, to which its corporate seal might be affixed. It was notice to the corporation that he required that his own oath should be supported, or rebutted, by the affirmation of

individuals who would act under proper moral and legal responsibility. What liability is incurred by the false response of a corporation? It is an intangible and artificial being, deriving its existence from legislative enactments, incapable of committing perjury, and as strongly expressed by chancellor *Kent*, "having neither soul to be saved nor body to be kicked."

The corporation then acted with full notice of what the complainant required, and being bound to know the legal character and effect of their own answer, if it is repudiated, the fault is their own.

What then is the effect of the answer of a corporation under its common seal, unsupported by either the oath or answer of any of its officers? This question is settled in the case of the *Fulton Bank vs. the New York and Sharon Canal Company and others*, 1 *Page's Chan. Rep.* 311, in which the president of the corporation had made oath to its seal, and the secretary, "who was not an officer of the company at the time of the transactions," that he believed the facts to be true. Yet chancellor *Walworth*, after remarking, that as corporations answered under their common seal without oath, they were at liberty to deny every thing contained in a bill whether true or false, expressly laid down, "but no dissolution of an injunction can be obtained upon the answer of a corporation, which is not duly verified by the oath of some officer of the corporation, or other person, who is acquainted with the facts contained therein." That there was "no hardship in the rule as applied to corporations, as it only put them in the same situation as other parties."

This rule is sustained by reason and analogy. The injunction is granted upon the complainant's statements verified by his oath; nothing short of the oath of a defendant can countervail them. They are regarded as true not merely until denied, but, until there is a denial accompanied by all the weight of moral and legal responsibility that attached to him who made them. No one will pretend that the seal of a corporation furnishes as strong *indicia* of truth as the oath of

a responsible individual. On the contrary, as chancellor *Walworth* justly observes, “they are at liberty to deny every thing contained in the bill whether true or false.” To place then the bill of an individual regularly sworn to upon the same footing with the answer of a corporation under their common seal, would be virtually a denial of the efficacy of those moral and legal obligations under the weight of which every oath is taken. If therefore it were even admitted that the answer is strictly responsive to, and denies all the equity of the bill, it could not avail the defendants, because it wants the indispensable sanction of an oath

2d. Supposing it properly verified, and yet we contend that it cannot entitle the defendants to a dissolution of the injunction, and for the obvious reason that all its denials are from information and belief merely.

It is well settled, that an injunction will not be dissolved “unless the defendants positively deny all the equity of the bill. A denial from information and belief is not sufficient.” *Ward vs. Van Bokkelen*, 1 *Page’s Ch. Rep.* 100. *N. Rogers, et al vs. H. Rogers, et al*, *Ib.* 426. 5 *Peters’ Rep.* 111. 2 *Gill and John*. 208, and the case of the *Fulton Bank vs. the New York Canal Company, et al*, before cited, in which the chancellor says, “the officer of the institution, who was such at the time referred to in the complainant’s bill, has studiously avoided saying any thing as to the truth of the answer, leaving it to the secretary, who knows nothing of its truth or falsehood, to express his belief on the subject.” In this case too the secretary made oath to his belief of the truth of the answer, while here there is no affidavit by any one, not even as to the seal of the corporation. The sentence we have quoted appositely describes the conduct of the president of this corporation. He will neither answer for himself, nor verify the answer of the company. We insist therefore that upon both grounds the answer of the corporation must be disregarded.

But if the answer is respected and its statements accorded the weight of positive denials, we should still contend that

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there is sufficient matter in the bill, that the corporation has either not denied, or omitted and refused responding to, and which on the question of dissolution is to be taken as true. *Young vs. Grundy*, 6 *Cranch's Rep.* 51, for granting and continuing the injunction.

We cannot, however, doubt that under the circumstances of this case, the court will decline entering into any analysis of the answer with a view to discover its admissions or omissions, but will look solely to the bill, which is uncontradicted upon oath, as furnishing the only evidence of truth by which to direct their inquiries.

Did the complainant then present in his bill an appropriate case for the interposition of the court of Chancery by injunction? What are the facts upon which he sought relief?

The bill alleges that the complainant's father being seized in fee under a patent from the state, of a valuable tract of land bounded on the *Susquehanna river*, established upwards of twenty years since, by clearing out the bed of the river at a considerable expense, certain fisheries on said property, at which by means of seines hauled over certain portions of said river, large quantities of shad and herring were annually taken.

That at his death he devised said estate with all and singular its rights and advantages of fishery to the complainant, under which devise the complainant entered into possession and has always since then quietly and without any kind of interruption, held, used and enjoyed the same, together with its rights and advantages of fishery, as laid down in a plat made out and sworn to by the surveyor of *Cecil county*, and exhibited with his bill, shewing the river, fishing shores, the haul of one of his seines, and the wharf, which the rail road company are constructing.

That in the year eighteen hundred and eleven, the testator leased to one *Martha Coffield*, for the term of ninety-nine years, at an annual rent, with covenants for renewal and for re-entry or non-payment of the rent, about eight acres of said estate. That immediately below said lot one of the said

fisheries was established, and the haul of the seine from which extends along and above the shore of said lot and over to the bar making into the river from *Watson's Island*, as particularly shown upon the plat: and that owing to the rapidity and strength of the current of the river, a seine cannot be laid out and hauled from said fishery in any other direction than that designated on said plat; and that the complainant and those under whom he claims, have so used, possessed and enjoyed said haul, without interruption, and been always accustomed so to lay out their seines, for upwards of twenty years.

That the *Susquehanna and Wilmington Rail Road Company*, a private corporation, created by a statute of Maryland, have located the track of their road over the said lot, leased to *Coffield*, and are erecting a wharf from the shore, where the line of said road terminates.

That the *Susquehanna river* is two hundred and forty-three perches wide at the point where said wharf is to be erected, and that it is ninety-four perches from the *Cecil* shore, at said point, to the opposite shoal or bar formed in said river, from the lower end of *Watson's Island*; that said wharf extends forty-nine perches from the shore, being more than one-fifth of the width of the river, and exceeding half its width from the *Cecil* margin to the bar making from the lower end of *Watson's Island*: that it will encroach about two hundred and fifty feet upon the channel of the river flowing between *Watson's Island* and the *Cecil* shore, and extend that distance further than is necessary to admit of the safe and easy approach of any vessel navigating the said river, or which said rail road company can desire to employ for the purpose of crossing said river, if they have any authority to establish a ferry, or place any fixture below high-water mark, in said river, and that the construction of said wharf will be an injury to the navigation wholly unauthorized by their charter.

That said wharf will extend across about one-half of the haul of complainant's seine from his aforesaid fishery, render it impracticable to fish it as heretofore, and entirely destroy

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the fishery. That the said haul, appurtenant to said fishery, as aforesaid possessed, used and enjoyed, for upwards of twenty years, is a valuable right, defined and protected by law, and which the said rail road company have no authority to impair or injure, and that his said fishery, which the erection of said wharf will utterly destroy and ruin, is worth fifteen thousand dollars.

The bill further alleges that the complainant owns several other valuable fisheries, situate on said river, a short distance below the before mentioned fishery, which, with the hauls respectively attached to them, have been possessed, used and enjoyed by him, and those under whom he claims, for upwards of twenty years, and that the erection of said wharf will tend greatly to injure, if not entirely destroy them; that the great quantity of mud and other deposite which will lodge and accumulate about said wharf, and gradually spread itself and settle for a considerable distance along the shore, will fill up and ultimately render the whole shore now owned and used for fishing by complainant, a flat of alluvial deposite, unfit for fishing, and valueless.

That the water which covers the haul of his several fisheries has been from time to time, by the proprietors thereof, cleared of obstructions at great cost and expense, in order to improve the fisheries; that his said last mentioned fisheries, and shore adapted to fishery, is worth *sixty thousand dollars*, and that if the same is not entirely destroyed it will be very much injured and depreciated in value by the erection of said wharf.

The bill further alleges that the said wharf is not necessary or indispensable for any legitimate purpose within the charter powers of said company, but is a device and invention of its agents to narrow the passage across said river, without authority, and to the great injury of complainant and the public; and that if any authority to erect a wharf has been conferred on said rail road company, which is denied, it was never intended that they should exercise it so as to interfere with the paramount interests and rights of navigation or fishery.

We have made these extracts from the bill in order that the court might have a condensed statement of the prominent facts on which the orders of the chancellor, from which this appeal is taken, were based.

1. The appellee claims to be entitled as *riparian* proprietor to a moiety of the bed of the *Susquehanna river* in front of his estate, and to a several right of fishery over the same

The wharf which the rail road company is constructing projects into the river within these limits; and if the appellee's pretensions are well founded, clearly encroaches on his property.

It will no doubt be contended on the part of the appellants, that according to the rule which has prevailed in *England*, the *riparian* proprietor is not entitled to the soil or several fishery *filum aquæ* of *navigable* rivers, and that, as the *Susquehanna*, where it bounds the estate of the appellee, is a navigable river, meaning technically a river in which the tide ebbs and flows, he is subject to the operation of that rule.

What then is the *English* rule, and how far does it apply to this case?

It seems always to have been well settled in *England* that every *riparian* proprietor was entitled *prima facie* to the soil and right of fishery, *ad filum medium aquæ*, in all private and public rivers, in the *former* absolutely, and in the *latter* subject to the easement of navigation.

Hale, in his treatise *De Jure Maris*, ch. 1, *Harg. Law Tracts*, 5, says, "Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side, have of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquæ*; and the owners of the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience."

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Ch. 3, page 8—"There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use, for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods or both from one inland town to another. Thus the rivers of *Wey*, of *Severn*, of *Thames*, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of the king's propriety, are public rivers, *juris publici*. And therefore all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments and removed."

The author must not be understood as meaning that the soil of public rivers is "*prima facie publici juris*," but only that the public are entitled to the use of the stream for the purposes of navigation and commerce, as is shewn by the following quotation from ch. 2, p. 8, in which he treats of the "*rights of prerogative*" over such rivers. "These public rivers for public passage are called *fluvii regales*; not in reference to the propriety of the river, but to the public use. And therefore the report in *Sir John Davyes* of the piscary of *Ban* mistakes the reason of these books, that call these *streames le roy*, as if they were so called in respect of propriety, for they are called so because they are of public use, and under the *king's* special care and protection, whether the soil be his or not."

But the property in the soil of all arms of the sea and rivers in which the tides flowed was *prima facie* in the *king*. *Hale's De Jure Maris*, ch. 4, pp. 10, 11, 17; ch. 5, pp. 19, 20, and opinions of *Hale*, *Ch. Jus.* in the case of *Lord Fitzwaller*, 1 *Mod.* 106; *Holt*, *Ch. Jus.* in *The King vs. Wharton*, *et al*, 12 *Mod.* 510; *Lord Mansfield* in *Carter, et al vs.*

Murcot, et al, 4 Burr. 2164, and of *Buller Jus.* in *Rex vs. Smith, Doug.* 446.

The rule then is well established in *England*, that the right of property in the soil of navigable rivers is *prima facie* vested in the crown, and in that of private rivers, in the *riparian* proprietors, *usque filum aquæ*.

These principles, as well as the reasons on which they were established, have been recognized and adopted in this country in the following cases. In *Palmer vs. Milligan*, 3 Caines, 319, *Kent, Ch. J.* applied the doctrine to the owners of the banks of the *Hudson river* as low down as *Stillwater*. So as to the river *Saranac* in the case of *The People vs. Plate*, 17 John. Rep. 197, and as to the *Salmon river* in *Hooper vs. Cummings*, 20 John. Rep. 90. The same general rules are adhered to in *ex parte Jennings*, 6 Cowen, 518, and *per chancellor Walworth* and *senator Allen*, in the case of *The Canal Commissioners vs. The People on the relation of Tibbits*, 5 Wendall, 423. In the cases of *Adams vs. Pease*, 2 Con. Rep. 481, and of the *Commonwealth vs. Chapin*, 5 Pick. Rep. 199, they are applied to the *Connecticut river*—in *Clarmont vs. Carlton*, 2 New Hamp. Rep. 370, to the *Sugar river*—in *Hayes, Ex'rs vs. Bowman*, 1 Ran. Rep. 418, to *South river*, and in *Gavit vs. Chambers, et al*, 3 Ham. Rep. 495, to the *Sandusky river*. They are adopted by judge *Story* in the case of *Taylor, et al vs. Wilkinson, et al*, 4 Mason's Rep. 400, in respect to the *Pawtucket river*, and adhered to by him, in *Farum vs. Blackstone Canal Corporation*, 1 Sum. Rep. 52. In the cases decided as to the rivers *Hudson*, *Connecticut* and *Sandusky*, the doctrine was applied to portions of those rivers that were navigable and used as public highways; and the opposite views asserted by a majority of the court in *Carson vs. Blazer*, 2 Bin. Rep. 476, are controverted in both *Hooker vs. Cummings*, and the *Commonwealth vs. Chapin*.

But in some of the states the *riparian* right has been deemed, as we think it should in *Maryland*, to apply equally to rivers in which the tides flowed and reflowed. In *New*

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Jersey the grantees of lands bounding on the *Delaware*, *Rariton*, and other navigable rivers, as well as those adjacent to public rivers, own the soil to the centre of the stream. *Angell on Tide Waters*, 44.

2. The appellee claims a right of property in the bed of the river, *filum aquæ*, under a grant, which may be presumed from his long and uninterrupted possession.

Such a right in a navigable river might be granted in *England* by the *king*, and here by the *State*. Has then the appellee's possession been of sufficient duration to afford the presumption of a grant?

It is well settled, both in *England* and in this country, that an uninterrupted possession for twenty years, is a sufficient foundation for the presumption of a grant. 6 *East*. 215. *Gray vs. Bond*, 2 *Brod. and Bing*. 667. 4 *Wash. C. C. Rep.* 608, and in the case of *Palmer vs. Hicks*, 6 *John. Rep.* 137, it is conceded that evidence of long exclusive possession and use, will warrant the presumption of a grant of lands under navigable waters, to the owner of the adjacent soil. No distinction is taken in this case in regard to the presumption, as against a title set up by a citizen, and that preferred by the *State*, though the court seem to allude to a claim by the commonwealth. But in *Maryland*, by the act of 1818, *ch.* 90, such a possession is made, *per se*, a complete bar, not only as against an individual, but to any claim asserted on the part of the *state*; the act is, in terms, an unconditional surrender on the part of the state, in favour of any party who has held twenty years undisturbed possession. But if the right of entry by the state is not expressly barred in the present case, still this statute is applicable by analogy, and in that view furnishes evidence of the length of possession, which should authorize the presumption of a grant. "In general the supposition of a grant is limited to periods analogous to those of the statute of limitations in cases where the statute does not apply." *Ricaud vs. Williams*, 7 *Wheat. Rep.* 59.

If then the appellee has acquired a title to the bed of the

river in any of the modes we have suggested, he is *prima facie* entitled to a several fishery in the same.

The next inquiry is, as to whether these rights were transferred to *Coffield*, so far as the demised premises bind along the river?

Conceding that the lease *prima facie* vested in the lessee the property in the soil to the middle of the river, yet we apprehend, it is competent for the appellee to rebut this presumption of title. There is nothing in the record shewing, that the soil covered by the river, and embraced within the haul of one of the appellee's fisheries, is expressly mentioned as parcel of the demised premises, but on the contrary, as the lot is located on the plat, it only extends to the shore. If it passed then it must have been by implication and presumption, which may be explained or contradicted by circumstances, showing that the lessor and the appellee have continually exercised acts of ownership over it. *Doe vs. Burt*, 1 Term Rep. 704, and *Keenlake vs. White*, 2 Stark. Rep. 508.

The evidence furnished by the averments of the bill, is, that they had annually removed obstructions, and held, used, and enjoyed the premises as appurtenant to their fishery, and without any kind of interruption. Are not such acts of ownership then for the period of twenty years, over the place in controversy, sufficient to repel the presumption of its being part of the demised premises? We think they should be so regarded.

But admitting that the right of property in the soil of the river, passed to *Coffield* as a part of the demised premises, and still we contend, that the circumstances stated in the bill, lay a proper foundation for the presumption, that a several right of fishery was reserved.

The soil of a river may be granted and a several right of fishery reserved. Such a reservation might be by *parole*, 6 John. Rep. 5; though a sufficient time has elapsed in this case to presume it was by deed. If then the continuous use and enjoyment of a several right of fishery in the water

opposite the demised lot, by the lessor and the appellee, for the whole period since the date of the lease, being now upwards of twenty-five years, be regarded as rightful, and which it must in the absence of any allegation to the contrary, it must be presumed to have been reserved by the lessor. Such a presumption is supported by other facts in the case. The fishery was established at the time the lease was made. The rent reserved was but one hundred dollars, and the fishery is stated to be worth fifteen thousand dollars, but utterly valueless without the haul extending out into the river along and opposite the shore of the property leased. Can it then for a moment be supposed that the lessor made any demise which destroyed such a valuable property, and that upon the nominal consideration reserved as rent? We must therefore presume a reservation of the right of fishery, and if so, neither *Coffield* nor any party claiming under her, can be permitted to destroy such right.

Suppose that no such reservation was made and that the lessee became invested with both the right of property in the soil and the right of fishery; then we should contend, that the twenty years possession and enjoyment by the lessor and the appellee, warranted the inference, either of an abandonment, or a surrender of the fishery by the lessee. Such a period is sufficient to gratify the requisitions of the statute of frauds by affording the presumption of a surrender in writing and by deed.

4. The appellee claims a several right of fishery, in that part of the *Susquehanna river* where the rail road company are constructing their wharf, by usage, prescription, and an uninterrupted and exclusive enjoyment for more than twenty years.

The averments of the bill are, that the fishery, which the wharf will entirely ruin and destroy, had been established and kept in order for upwards of twenty years, at a considerable annual expenditure, incurred by the removal of obstructions out of the bed and water of the haul; and over which, during the whole of that period, they had been accustomed

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at the fishing season to lay out and haul their seine, in the manner described on the plat, without objection or interruption.

Do these facts then establish a several right of fishery, as claimed by the appellee?

1. It is well settled in *England* that a several right of fishery in navigable rivers may be acquired either by grant, usage, or prescription. *Hale*, in his *De Jure Maris*, ch. 5, p. 18, after speaking of a subject's right to a several fishery in the sea, if by the king's charter or grant, and which are without question, says, "The second right is that which is acquired or aquirable to a subject by custom or prescription; and I think it very clear, that the subject may by custom and usage, or prescription, have the true propriety and interest of many of these several maritime interests, which we have before stated to be *prima facie* belonging to the king. A subject may by prescription have the interest of fishery in an arm of the sea, or in a creek or port of the sea, or in a certain precinct or extent lying within the sea; and these not only free fishing but several fishing." And p. 19, "though *prima facie*, an arm of the sea be in point of propriety the king's, and *prima facie* it is common for every subject to fish there, yet a subject may have by usage a several fishing there, exclusive of that common liberty which otherwise of common right belongs to all the king's subjects." In the case of the *Mayor and Commonalty of Oxford vs. Richardson*, 4 Term. Rep. 439, Lord Kenyon says, "with regard to the question of law in this case, as to the right claimed by the plaintiffs, there can be no doubt but that there may be a prescriptive right in a subject to a several fishery in an arm of the sea;" and *Buller, Jus.* observes, "one party is to prove that this is an arm of the sea, in which *prima facie* every subject has a right to fish; the other is to establish a prescriptive right, which destroys the general right." *Ib.* 440.

It is equally clear that the right of several fishery may be established in the same manner in this country. *Jacobson vs.*

Fountain, et al, 2 *John. Rep.* 170. *Gold vs. James*, 6 *Cowen* 369. *Rogers vs. Jones*, 1 *Wendall*, 237, and *Brown vs. Kennedy*, 5 *Har. and John.* 206. The only case which questions this right, is that of *Warren vs. Mathews*, in 1 *Salk.* 357 and *S. C.* 6 *Mod.* 73, but that case is supposed to have been misreported, as none of the authorities cited in either report sustain it, but some of them directly the opposite, and it was so ruled in *Rogers vs. Jones*, by the supreme court of *New York*.

2. This right does not depend on a *riparian* ownership, but may be vested in a person who neither owns, nor has any interest in the banks or soil of the river in which it is exercised and enjoyed. "Fishery may be of two kinds, ordinarily, viz: the fishing with the net, which may be either as a liberty without the soil, or as a liberty arising by reason of, and in concomitance with the soil, or interest or propriety of it." *De Jure Maris*, 18. It is true that at one time some doubts seem to have been entertained in *England*, as to whether a several right of fishery could exist independently of an interest in the soil or adjacent banks of the river. But in *Coke Litt.* 122, *letter m*, it is laid down, that "a man may prescribe to have *separatum piscariam* in such a water, and the owner of the soil shall not fish there." In the annotations of *Hargrave*, *note 7*, he says, "according to this passage, ownership of the soil is not necessarily included in a several fishery;" again, "nor do we understand why a several piscary should not exist without the soil, as well as a several pasture;" and after collecting and reviewing the authorities in support of the opposite doctrine, he concludes, "hence, as it should seem, the arguments are short of the purpose; for at the utmost they only prove, that a several piscary is presumed to comprehend the soil, till the contrary appears, which is perfectly consistent with *Lord Coke's* position, that they may be in different persons, and indeed appears to us to be the true doctrine on the subject. *Ib.* And in the case of *The Duke of Somerset vs. Fogwell*, 5 *Barn. and Cres.* 875, an action was maintained by the plain-

tiff, without either the property of the soil or the water, for injury to his several fishery in the river *Dart*, where the tide flowed and reflowed.

It would therefore be competent for us to rely upon the long user and enjoyment by the appellee, and those whom he represents, as establishing a personal right in them, by usage and prescription, to haul the seine over the place where the rail road company are erecting their wharf.

3. But we contend further, that it is a right appurtenant to the fee simple estate of the appellee in the shore from which his seines are laid out. Within what period then may such a right accrue to a person by prescription?

There can be no doubt that the uninterrupted use and enjoyment of a right of fishery in a private river for the period of twenty years would establish title to a several fishery. It has been repeatedly adjudged that such user and enjoyment, in any particular manner, of the water of a stream not affected by the tides, afforded a conclusive presumption of right. *Balston vs. Bensted*, 1 *Camp. Rep.* 463, and *Taylor vs. Wilkinson*, 4 *Mason's Rep.* 404, and in the case of *Ingraham vs. Hutchinson*, 2 *Con. Rep.* 584, it was decided not to be necessary that such enjoyment should have been adverse to the claims of those affected by it. If we assume that the property in the soil and right of fishery, opposite *Coffield's* lot, were granted by the lease, then, according to the principle of the case of *Brown vs. Kennedy*, those rights were subject to the rules of law applicable to private property; and being so, the unexplained use, occupation and enjoyment by the lessor and the appellee, furnishes a conclusive presumption of right; consequently, no title derived under *Coffield* could avail the appellants.

4. But it will be urged that the river being navigable, the place in dispute belongs to the public, and as against them no right of several fishery could be acquired by the occupancy and user for twenty years.

In answer to that view we contend, that the facts of this case establish an unquestionable right both against *Coffield's*

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assigns and the state. It is true that legal prescription is still reckoned in *England* from the reign of *Richard I.* notwithstanding the statute 32, *Henry VIII.* reducing the time within which a writ of right should be brought, 2 *Black. Com.* 31; but so sensible are the courts of the great inconvenience of the rule, that they in effect evade its requisitions by uniformly directing the jury to presume a grant, after the lapse of twenty years; which is the very basis of a prescriptive right; and differs from it merely in respect to the mode of pleading and the nature of the presumption.

These views are ably illustrated and enforced in the case of *Coolidge vs. Learned*, 8 *Pick. Rep.* 505, in which the supreme court of *Massachusetts* held, that sixty years were sufficient to create a good prescriptive right; and in *Melvin vs. Whiting*, 10 *Pick. Rep.* 295, they determined that forty years possession established by prescription a right in the plaintiff of several fishery in the *Merrimack river*. But there are other cases in which a much less period of time has been deemed sufficient to support a right by prescription. In the case of *Jacobson vs. Fountain*, 2 *John. Rep.* 170, an action of trespass, for going upon the plaintiff's shore and several fishery in tide water, was sustained by evidence of a usage for only eighteen years; and *Chief Justice Savage*, speaking of this case, in *Gold vs. James*, 6 *Cowen*, 376, says, "*Jacobson vs. Fountain* is an instance in which the plaintiff proved a prescriptive right to the fishery opposite his soil." And why shall not a party as well be permitted to prescribe for a right of several fishery, as for a right of way; or for a charter to a corporation, as in *Stockbridge vs. West Stockbridge*, 12 *Mass. Rep.* 400, where thirty years usage was ruled sufficient; or for a ferry, *Stark vs. McGowen*, 1 *Nott and McCord* 378, and 3 *Page's Ch. Rep.* 314. In these cases the prescriptive right is established against the public, as the presumption is of a grant of the franchise from the government; and *vide* 5 *Har. and John.* 122. But we think that twenty years should be held sufficient in this state, by analogy to the act of 1818, *ch.* 90; which, viewed as a relin-

quishment on the part of the state, of a right of entry upon land, after twenty years uninterrupted occupancy, that the same time should, in respect to an incorporeal right, be adopted as the period of legal prescription.

5. If however, the averments of a quiet and uninterrupted enjoyment of this appurtenance are not sufficient to establish a right by prescription, yet we insist, that the appellee is entitled by usage to the several fishery.

6. But should a user for twenty years, when uncontradicted, be deemed *per se* insufficient to vest in him a *prima facie* right, it would still be competent evidence to authorize the presumption of *anterior* usage in support of the right asserted. *Parsons vs. Bellamy, Cridland, et al*, 4 Price's *Ex. Rep.* 190.

7. It will probably be contended on the part of the appellant, that the fishery enjoyed by the appellee was the mere exercise of a common right, and therefore gave no several property in the fishing place; and this view will no doubt be presented on the authority of the case of *Chalker, et al vs. Dickinson, et al*, 1 *Con. Rep.* 382. There the plaintiffs had uninterruptedly exercised the right of fishery in a particular place in the *Connecticut river* for fifteen years, and the court held, that as the river was navigable and the right of fishing in it *prima facie* public, the uninterrupted enjoyment for fifteen years, not being exclusive, conferred no right of several fishery. This case decided two questions, *first* that an uninterrupted was not necessarily an exclusive enjoyment; *secondly*, that in order to gain an exclusive right, the possession must be exclusive as well as uninterrupted. But while this case determines against the acquisition of the right by an uninterrupted enjoyment, it expressly concedes it when the possession has been exclusive. So that it clearly supports the doctrine we have been contending for, that the right might be acquired against the public by analogy to the period required by the statutes of limitations. But the difference between that case and the present consists in this, that the plaintiffs there, gave no evidence shewing that the

possession was exclusive, but rested solely on the ground that an uninterrupted enjoyment imported an exclusive one. They did not even prove that they owned the adjacent banks or shore from which they hauled, but seem to have enjoyed the fishery by nets or seines drawn from boats moored in the stream as is common even in the *Susquehanna*; much less that they had bestowed great labour or expended large sums of money, in clearing the bed of their haul of logs, rocks, mud and other obstructions in order to establish their fishery; and had annually, for upwards of twenty years, incurred trouble, labour and expense, in the removal of obstructions that accumulated in their haul, by periodical freshets in the river, so as to preserve their fishery. But they submitted their cause without offering evidence of a single fact from which even an inference that their possession was exclusive, could be drawn. Is that this case? Do we rest on the statement that we had “held, possessed and enjoyed this fishery quietly, without any kind of interruption, and been accustomed to haul seines there for upwards of twenty years?” No, but we aver acts, the very nature of which, are utterly irreconcilable with any other tenure than that of an exclusive one. It cannot be presumed that, either the testator would have incurred such labour and expense in the establishment of this fishery, or the appellee have continued an annual expenditure for upwards of twenty years, for its preservation, if it had been common property, and the public, or any one without his permission, had a right to participate in its enjoyment. These circumstances show that the possession and enjoyment was sole and exclusive. We have therefore in the present case established what would have availed the plaintiffs in *Chalker vs. Dickinson*, so that it is a direct authority in support of the appellee’s right of several fishery.

8. The right to lay out seines obliquely up the stream so as to fish the water in front of the shore above, is founded upon usage and custom. The bill expressly avers that owing to the rapidity of the current a seine cannot be laid out in

any other manner. The usage is general and prevails not only on the *Susquehanna river*, but at the fisheries on every stream where there is considerable current, and arose from necessity. The river is always so high during the fishing season as to render it utterly impracticable to lay out a seine opposite the fishing shore and land it at the same place in such a manner as to catch fish; the rapidity and power of the current would irresistibly sweep it down the stream, and cast it rolled up on the shore below. All sales and grants of lands bounding on the *Susquehanna* are made with reference to this usage, and never before, since a seine was first launched into the river, has this right been questioned. We submit, therefore, that under these circumstances, the lessee could not have intercepted the exercise of this right.

9. But the right of owners of fisheries on the *Susquehanna* to their respective hauls, is recognized and sanctioned by the act of 1807, *ch.* 114, and by a substitute for that act, passed in 1820, *ch.* 199. By this act the legislature evinced more than ordinary interest in the preservation of the invaluable and cheap source of sustenance which those extensive fisheries furnished; for they not only absolutely inhibit the enjoyment of the common right of fishery within the hauls of the shore fisheries, but even make the paramount right of general navigation, in some respects subordinate to their perfect security. Whatever therefore, may have been, antecedently to the enactments of this law, the tenure by which *riparian* proprietors who had established fisheries on the *Susquehanna*, held and enjoyed their respective hauls, this statute furnishes a distinct admission and affirmance on the part of the legislature, of their legal existence, and strong claims to protection. Will it then be determined, that those rights, which have been exercised for the public advantage under the sanction of legislative enactments for thirty years, have no legal foundation, and may be wrested from the citizen, without indemnity, by the pleasure or caprice of the appellants?

That an enlightened public policy vigilantly guards and

fosters those rights is shewn by the act of *Dec. Sess.* 1835, *ch.* 168, which, in granting to the owners of fee simple property, the right to wharf out into navigable rivers, annexes a proviso, that they shall not be “so extended as to interfere with the fishing or navigation of said waters.” And the act, under which the rail road company are claiming to erect this wharf, manifests the same anxiety to preserve the shore fisheries, by withholding the power of condemnation of property for the site of a wharf; they must acquire it by purchase: *vide sec.* 4, *ch.* 281, act of 1834.

MAYER, in reply, for the appellants.

Upon the absence of answer of the directors, with the answer of the corporation. That answer is called for only on the principle of discovery, with reference to the points relied on, it could have no effect. It might be useful in the further progress of the cause, but here, not necessary. The bill as against the agents of the corporation is merely for discovery, it can neither give nor withhold relief to the corporation. If the answer of directors was on file, the company, looking to the principles and origin of the practice requiring such answers, could not use it for their relief. In opposition to the corporate answer, of no effect.

If the answer of a corporation has not the effect of an answer on oath, as to injunctions, how could they procure a dissolution? Proof which could not avail, is not to be demanded. The legislature might apply a remedy.

The case in 5 *Peters*, simply decides, that the answer as evidence at the final hearing shall not have the effect to require two witnesses to contradict it. In *England*, in ordinary cases the bill and answer are before the chancellor, prior to issuing the injunction.

There is however, more here than a mere answer. The petition of the complainant by the oath of the president refers to the answer and verifies it. The oath of the engineer shows the necessity of the wharf as constructed by the company. It was filed with the answer, and denies the equity

of the bill. The defect of the bill as to officers, is that they are not connected with the discoveries sought.

But independent of this question, there is sufficient reason on the face of the bill, against the injunction, which arises from the merits. A wharf is complained of. The intention of the company is immaterial. The effect of the wharf is matter of inducement. What does the bill charge? That the owner of the land for twenty years, had certain fisheries; that the wharf will injure the fishery and navigation. The bill insinuates that the wharf is longer than the company can desire, if they have any authority to erect it, and assigns as a reason for it, that there is an easy and safe approach for a ferry boat to the shore. This is the whole rationale of the complainant's conclusions. The bill is argumentative as to this point, and is destitute of the necessary averments to present a case of improper extension of the wharf into the river.

What is the object of the bill? There is no usurpation of the soil, on which the wharf is erected. The right of the state to create the rail road company is not denied. But he complains of an incidental injury, for which his bill can call for no specific relief but by injunction; as to an injury to the fishery, the law could give him full redress.

Then as to an injury to navigation. As to this no information lies by the attorney-general. The only remedy is by indictment. The grand jury cannot be superseded by other process. It is criminal in its character. A matter of public nuisance, no individual, except for injury sustained, could be redressed at common law. No invasion of complainant's freehold. The wharf is to subserve a public object, and the company is to subserve the accomplishment of a public end. They would be amenable as common carriers, if they capriciously refused to accommodate the public.

Looking to the injunction as merely an intermediate step, the court will not sustain it, as the bill looks to no ulterior measures, but assumes that chancery would give full relief,

which is palpably wrong. If the charter is not void, the bill must be dismissed.

The *termini* of the road being fixed, the company are to adopt all intermediate acts, though not expressly authorized, and for injury to these, the redress is at common law. So is the case of the circuit court of *Pennsylvania* cited in the argument.

Has any right been invaded? Doctrines are assumed here, which go far to divide the sovereignty of the state with the *riparian* proprietors of the river, because the exercise of sovereign right may interfere with the private proprietor. The right of several fishery, of free fishery, depending on prescription, is made to ride over all public powers, exercised against its interest. They must catch their fish, no matter who is affected. The paramount right of navigation is denied by them. The right of fishing for trade or subsistence is not a right of property.

The waters of public rivers belong to the state. The right of fishing is not an interest in the waters. It is a privilege to catch where you may. The prescription does not alter the character of the right. It merely excludes other *persons*, but the state has not parted with the soil. Let them go on with accretions of power, the lords of the *Susquehanna* would take the whole power of the state on the doctrines of a several fishery. The grossness of these results shows the absurdity of the doctrine. Upon his next bill complainant will include one-half of the river, because for twenty years he has had the right to fish. Several or common, it is but a fishing in a navigable river, which is a common right. The lapse of time does not change the character of the right, as regards the rights of the state, both classes are in like condition. Even in private streams the right of navigation exists separate from that of fishery. *Ex parte Jennings*, 6 Cowen, 528. *Hooker vs. Cummings*, 20 John. 90. The *riparian* owner cannot disturb navigation. But this is a public river, whose waters are under the public care for public purposes. In *England*, the king

cannot appropriate public streams to the interference of navigation, but the *riparian* proprietors may build wharves to benefit it. In 5 *Har. and John*. 195, all the judges concur with regard to public streams, and the state has no right to grant a monopoly of fishing on a public stream.

The cases cited in argument were of prescriptions between individuals, now set up as against the public. There is no authority to warrant that. Prescription does not apply to the state.

The right of navigation is more than the right of passing on a public river. *Angell on Tide Water*, 132.

SPENCE, Judge, delivered the opinion of the court.

The complainant in his bill charges, that heretofore *John Stump*, the father of this complainant, being seized in fee under grant by patent from the state of *Maryland*, of a tract of land called *Perry Point*, situate in *Cecil* county, at the mouth of the *Susquehanna river*, established upwards of twenty years since certain fisheries on said property, and at which by means of seines hauled over certain portions of said river, large quantities of shad and herring were annually taken.

That afterwards the said *John Stump* departed this life, having by his last will and testament executed in form and manner, sufficient to pass real estate, devised said estate, with all and singular its rights and advantages of fishery to your orator, under which said devise he entered, &c.

That on the second day of March, 1811, the said *John Stump* leased and demised to one *Martha Coffield*, of *Cecil* county, for the term of ninety-nine years, with covenants for the renewal thereof, eight acres of said estate, binding on the said public road, leading from the *Susquehanna river* to *Chestertown*, and along said river, &c.

The bill also charges the river *Susquehanna* to be a public navigable river, and that the erecting this wharf, and the employment of steamboats, will be destructive of the para-

mount interest of general navigation and fishing, and that any obstruction of those rights would be void.

In this cause it is the object of the complainant to establish his right to a several fishery, and he alleges, that the uninterrupted use and enjoyment of the same for more than twenty years, is sufficient in law to raise the presumption of a grant of a several fishery. There is not to be found in the bill any allegation of an exclusive possession and use of this fishery, by the complainant, and those under whom he claims, nor is it averred, that others did not use and enjoy this right of fishing in the *locus in quo*, in common with this complainant. The bill charges this to be a public navigable river, where this several fishery is attempted to be established by presumption, and upon these allegations this court is called upon to decide, that a grant is to be presumed of an exclusive fishery.

We know of no principle of law, and we have seen no adjudicated case, which sanctions such a conclusion. That a presumption can be raised of a grant of a several fishery in a public navigable river, from the fact of an individual using the same in common with others, is at this day a strange doctrine: and the bill in this case does not allege, that the complainant, and those under whom he claims, had an exclusive possession: and it is the uniform language of the courts, that they will not presume a grant of land under navigable waters, to the owners of the adjacent soil, without evidence of long exclusive possession and use, to warrant such presumption. *Palmer vs. Hicks*, 6 *John. Rep.* 133. If it be law, that a court will not presume a grant of a several fishery in a public navigable river, without proof of long exclusive possession and use, it follows as an irresistible conclusion, that the omission to make such averment is fatal to this bill.

The allegation in the bill, that the erecting the wharf, and the employment of steamboats, will be destructive of the paramount interests of general navigation and fishing; and any grant destructive of those rights, though void, furnishes no ground for injunction; but it, the remedy by injunction, is applicable only to special injuries, in violation of private

right; and individuals are not authorized to redress public grievances at their own suit, either at law or in equity.

In the above decision we do not desire to be considered as expressing the opinion, that if there had been an averment of an exclusive fishery from long adverse enjoyment, that by the laws of this state, a legislative grant might or might not be presumed; but leave that question open for future decision when it shall arise.

INJUNCTION DISSOLVED.

JAMES PANNELL *Executor of* THOMAS JEFFREY vs. JAMES WILLIAMS.—*December, 1837.*

Since the act of 1825, ch. 120, the execution of an instrument of writing, to which there is a subscribing witness, may be proved without calling such subscribing witness, though he is present in court at the time of the trial. In an action upon a single bill, of which the plaintiff is in possession, proof of the defendant's signature is sufficient *prima facie* evidence of its due execution by delivery, to go to the jury, though the validity of the instrument is disputed by a general *non est factum* plea.

APPEAL from *Harford* county court.

This was an action of *debt*, brought on the 15th July, 1833, by the appellant, who declared against the appellee for \$450, due on his single bill, executed 1st September, 1831, and to which *John S. Williams* was the subscribing witness. Issue was joined on the plea of *non est factum*.

At the trial, the plaintiff on his part offered in evidence the single bill of the defendant, which was in his, the plaintiff's possession, and proved that the name of the defendant thereto subscribed, was in the proper hand-writing of the defendant.

The defendant then objected that, the evidence so offered, was not sufficient evidence of the signing, sealing, and delivery of the said bill, and prayed the court to direct the jury, that the said evidence was not sufficient to support the

issue on the part of the plaintiff, the subscribing witness being then in court; which direction the court gave. The plaintiff excepted, and brought up the cause by appeal.

The case was submitted on written arguments of counsel, to BUCHANAN, Ch. J. and DORSEY, CHAMBERS, and SPENCE, Judges.

OTHO SCOTT, for the appellant, contended :

That since the act of 1825, *ch.* 120, a bill obligatory, to which there is a subscribing witness as in this case, may be proved in the same manner as if there was no subscribing witness; nor does the act make any distinction in cases where the subscribing witness is in court, or in reach of its process. Its object was to dispense with the necessity which previously existed of producing the subscribing witness. If such testimony is material to a defendant, he can still have it, and in this case the defendant could have called up the subscribing witness, so that no injustice was done by relying on the proof of the hand-writing.

Assuming then, that the bill could be proved as if there had been no subscribing witness, the only question is, was there sufficient evidence, *prima facie*, to entitle the plaintiff to a verdict, if the jury believed the proof, and drew the conclusion of fact from it, sought to be established by the plaintiff. On this point the practice has been so uniform, and the reasons seem to be so obvious, there can be no room for doubt. The possession of an instrument is evidence of delivery, for the plain reason, that when he has it, the law will intend he came by it properly, till the contrary is proved. The question has frequently been settled. *Clark vs. Ray*, 1 Har. and John. 323. *Union Bank vs. Ridgley*, 1 Har. and Gill, 419.

The sealing is proved *prima facie* by proving the signature. This is the only mode of proof, of which the matter is capable, where there is no subscribing witness, and is the mode universally admitted. *Miller vs. Honey*, 4 Har. and John. 241. 1 Selwyn's *Nisi Prius*, 452, in notes.

The evidence then offered by the plaintiff below, was *prima facie* to prove the complete execution of the bill obligatory upon which the action was brought, and ought to have been submitted to the jury for their consideration.

CONSTABLE, for the appellee.

The counsel for the appellant having declared that he would ask a final judgment in this case, in the event of the opinion of the court below, being reversed, it is proper that I should state in reply, that the appellee fully expected to sustain his plea by the evidence of the subscribing witness, which would have shewn that there never was a valid delivery of the note sued upon. Owing to some misapprehension, however, he was not present at the trial, and the subscribing witness not being competent to testify for him without a release, which could not then be procured, the prayer was offered with a view to compel the plaintiff to call the subscribing witness, who had been summoned and was present. Under these circumstances, should the judgment be reversed, a *procedendo* ought to be awarded.

The opinion and direction given by the county court, presents two questions :

1. Whether upon an issue tendered by a *general non est factum* plea, the plaintiff is not bound to examine the subscribing witness, if in attendance at the trial.

Prior to the act of assembly of 1825, *ch.* 120, a plaintiff was obliged to resort to the testimony of the subscribing witness, in every case where it was practicable to obtain it. Was this enactment designed entirely to abrogate this long established rule of evidence? We apprehend that the legislature only intended to relieve a plaintiff from the burden of producing the subscribing witness, but not to supersede the rule requiring his testimony *when actually in court attending the trial*, as was this case. The law required the evidence of the subscribing witness, because it regarded him as possessed of more accurate knowledge of the circumstances of the transaction. And the rule was adhered to so rigidly

that, neither proof of the confession of the obligor that he executed the bond, *Douglass*, 216; nor such admission in an answer to a bill in chancery, filed for the very purpose of obtaining the discovery, could dispense with his testimony. 4 *East*. 53. The inconvenience to which this rule sometimes subjected plaintiffs, gave rise to the act of 1825. Its object was to provide a remedy, and this we think, is fully accomplished by permitting the introduction of other testimony, when that of the attesting witness cannot as readily be obtained. Where then was the necessity for dispensing with the more certain and better evidence of the subscribing witness when equally convenient? No reasons of public policy or convenience could have operated, to induce a change to that extent. I therefore submit that, as the purpose of the framers of the act, will be entirely gratified without dispensing with the examination of the subscribing witness, when present at the trial, it should not be construed, however comprehensive its language, to embrace a case like the present.

2. Supposing the proof of the signature admissible and competent, was there any evidence of the *delivery* of the bill obligatory?

The evidence of delivery in this case, consisted of proof that the defendant signed the note, and that it was in the plaintiff's possession; and the inquiry is, whether these facts warranted an inference, that it was delivered to the plaintiff as the bond of the defendant.

A plaintiff may have the possession of a bond signed by the obligor, and yet there may have been no delivery to give it legal efficacy. I am aware that in some cases, where the instrument has been offered as evidence of a collateral fact, its possession, accompanied by proof of the signature, has been held sufficient without proof of delivery; but where the bond is the foundation of the action, and the plea of *general non est factum*, denying its legal validity under oath, is filed, I contend, that the plaintiff cannot rely merely upon proof of the signature and his possession, but must adduce other

evidence. The fact of a *present* possession should not *per se*, be deemed sufficient evidence of delivery. The issue is not whether the plaintiff has the possession in point of fact, but in law, and that must depend upon the manner in which he obtained it. The *onus* is upon him to shew this. Does then, the bare exhibition of the bond, sustain the issue on his part? What explanation does it furnish of the circumstances under which the bond was originally obtained? None. These facts cannot therefore establish a *prima facie* case in answer to the defendant's plea.

In 1 *Loft's Gilbert on Evidence*, 103, it is said, "though a deed be produced under hand and seal, and the hand of the party that executes the deed be proved, yet this is no full proof of the deed: for the *delivery* is necessary to the essence of the deed, and the deed takes effect from the delivery, so that, unless the delivery be proved, there is no perfect proof of the deed; and *there is no proof of the delivery but by a witness, 'who saw the delivery.'*" The same rule is laid down in *Buller's Nisi Prius*, 254. In 1 *Wheat. Selwyn*, 451, it is observed, "that to prove the execution of a bond, the sealing and *delivery* must be proved. *Proof of the sealing only is not sufficient.*" And in 1 *Saund. on Plea. and Ev.* 518: "the sealing and *delivery* of a deed, which are essential to its validity as a deed, must be proven, *which must be done by some third person if there was no attesting witness.*"

The mode of proof resorted to in this case seems to have escaped the astuteness of all these authors. It appears never to have occurred to them, that the possession of the instrument was a circumstance from which the law would presume a delivery; but on the contrary, looking to the issue framed by the pleadings, which treats the *delivery* as a distinct essential to a valid deed, they inform us, that it must be proved by the attesting witness, or by some "third person," who "saw the delivery," and that proof of the sealing and of signing "is not sufficient,"—"no perfect proof of the deed."

And what is the averment on the part of the plaintiff here? It is, that the defendant, "by his writing obligatory, sealed with his seal, &c." which imports that the defendant signed, sealed, and delivered it; the delivery being implied. *Cro. Eliz.* 737-8. *Cro. Jac.* 420. The plea puts in issue each one of these requisites of the bill obligatory declared upon, and the plaintiff is bound to prove them. The intendment which dispenses with an averment of the *delivery* is a rule of pleading, founded on the idea, that is implied in the term "*writing obligatory*." But does not apply to questions concerning the sufficiency of evidence, as by settling that proof of the execution of a bill obligatory necessarily included the delivery, or in any manner determine what shall be competent proof to establish the delivery.

In *Chamberlain vs. Stanton*, *Cro. Eliz.* 122, the plaintiff being in possession of the obligation, proved that the defendant had caused it to be written, and signed, and sealed it; and it was adjudged, that these facts constituted no evidence of a delivery. Yet they are stronger than the circumstances relied upon in this case.

The case cited by the appellant's counsel, of *the Union Bank vs. Ridgely*, 1 *Har. and Gill*, 417-18, is not applicable. There the defendant by pleading *specially*, instead of *generally*, drew the *onus* upon himself, and it was sufficient for the plaintiffs to rely on their possession. In *Miller vs. Honey*, 4 *Har. and John*. 241, also cited by the counsel for the appellant, the defendant not only filed a *special non est factum plea*, but no point seems to have been made or decided, as to the competency of the evidence with respect to the *delivery* of the bill obligatory. But that case is very distinguishable from the present in another point of view. There the subscribing witness was examined, and proved that the attestation was in his hand-writing. It therefore belongs, properly, to that class of cases, in which such proof is deemed sufficient evidence of every thing on the face of the paper, which the witness professes to attest, and one of these is the delivery. *Adam vs. Kers*, 1 *Bos. and Pul.*

360. On the same ground *Lord Ellenborough* decided the case of *Milward vs. Temple*, 1 *Camp. Rep.* 375. Where, though the signatures of both the defendant and the subscribing witness *were admitted*, yet he doubted at first, whether the delivery of the bond, as his deed, ought not also to have been admitted, or still be proved, to entitle the plaintiff to a verdict; but upon consideration, he said, “as the attesting witness’ hand-writing was admitted, this might be taken as a presumptive admission of all he professed to attest, and would have been called to prove.” He did not consider the possession of the bond, and the admission of the obligor’s signature sufficient to entitle the plaintiff to a verdict, without an admission or proof of the *delivery* of the bond. The decision rests exclusively upon the inference, arising from the admission of the attesting witness’ hand-writing.

In the present case however, the plaintiff adduced no evidence of the attestation of the subscribing witness, so as to furnish the presumption relied upon in *Milward vs. Temple*, but simply proved the signature of the *obligor*, which we submit, when the plea put directly in issue the signing, the sealing, and the delivery, each substantive and independent facts susceptible of clear proof, was not sufficient to entitle him to a verdict.

SPENCE, Judge, delivered the opinion of the court.

This was an action of *debt* in *Harford* county court by *James Pannell*, executor of *Thomas Jeffery*, against *James Williams*. The defendant pleaded *non est factum*, and upon that plea, issue was joined.

At the trial, the plaintiff to support the issue on his part, offered in evidence the bill obligatory of *James Williams*, which was in his plaintiff’s possession, and purported to have been signed and sealed by said *James Williams*, and attested by a certain *John S. Williams*. The plaintiff further proved but not by the subscribing witness, that the name of the defendant thereto subscribed, was in the proper hand-writing of the said defendant, *James Williams*, and

Pannell vs. Williams.—1837.

there rested his case. The defendant objected, that the evidence so offered was not sufficient evidence, of the signing, sealing, and delivery of the said bill obligatory, and prayed the court to direct the jury, that the said evidence was not sufficient to support the issue on the part of the plaintiff, the subscribing witness being then in court. Which direction the court gave. The plaintiff excepted, and this presents the question now for adjudication.

We are of opinion that the court erred in their instruction to the jury in this cause.

The act of assembly of 1825, *ch.* 120, provides that in every suit or action at law, or in equity, in which it may be necessary to prove the execution of any instrument of writing whatsoever, attested by a subscribing witness or witnesses, it shall and may be lawful to prove the execution of such instrument of writing, in the same manner, and by the same evidence, that the same ought to be proved if not attested by a subscribing witness or witnesses.

The plaintiff being in possession of the bill obligatory, and having proved that the name of the defendant thereto subscribed was in the proper hand-writing of said defendant, the possession by the plaintiff was *prima facie* evidence of the due delivery of the bond, which the court should have permitted to have gone to the jury by them to be determined. 1 *Har. and Gill*, 418.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

INDEX.

ACTION—RIGHT OF.

1. In an action of *debt* by the appellant against the appellee, on a policy of insurance issued by the latter, guaranteeing to the bearer on a day named, the sum of \$5,000 on presenting the same at the office of the company; it was *held* on special demurrer to the declaration, in which the plaintiff averred that he was the bearer of the policy, and that the same was presented on the day named, but was not paid, that the action might be maintained. *Ellicott vs. United States Ins. Co.* 166

2. That such an instrument was as much the representative of money as exchequer bills, bank notes, bills of exchange, or promissory notes, payable to bearer, or endorsed in blank, and as such passed by delivery. That possession was *prima facie* evidence of title, and when sued on by the holder, it need not be averred, that the defendant made the policy with the plaintiff; or with whom it was made, or by whom the securities were deposited, and premium paid; or that the plaintiff was the bearer at the time it was made, or when he became such bearer; or that he was the bearer thereof on the day it fell due, and presented it for payment at the office of the defendant, *Ib.*

ACTS OF ASSEMBLY.

1. The construction given to the statute *Westm. 2. 13 Edw. 1*, ch. 18, adopted by analogy, and applied to the act of 1810, ch. 160, requires that judgments at law from the time of their rendition should be liens upon equitable estates in real property, and are recognized as such in courts of law. *Miller vs. Allison, et al.* - - - - - 35

2. The act of 1825, ch. 103, is remedial in its character, and should be liberally construed to carry into full effect the designs of the legislature. *McMechen vs. Marman*, - - 57

See Exceptions to Auditor's Statements, 1, 2.

1779, ch. 25. (Poundage Fees,) 470
See Sheriff, 9, 10.

1785, ch. 45. (Descents,) - - 1
See Devise, 1, 3.

1796, ch. 67, sec. 13. (Manumission,) 32

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1809, ch. 153. (Amendment,) 125
See Costs, 1.

1819, ch. 187. (Seamen,) - - 79
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1825, ch. 119. (Devise,) - - 437
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See Evidence, 22.

1832, ch. 197. (Appeals,) - - 214
See Injunction, 3.

1832, ch. 302. (Exceptions to Evidence,) - - - - - 136
See Practice in Chancery, 3.

1835, ch. 339. (Appeal,) - - 386
See Appeal, 1.

AMENDMENT.

1. The giving of costs is not a valid objection to a judgment against the *State*; but if it were, this court will regard it as a clerical error, and permit the party here, in whose favour it was rendered, to correct the error according to the provisions of the act of 1809, ch. 153, sec. 2. *State use Robey vs. Turner*, 125

ANSWER IN CHANCERY.

1. The answer of one defendant is not evidence against a co-defendant, even as to matters in contest

between the complainant and such co-defendant; and much less would such answer be evidence in adjudicating upon the conflicting claims of the defendants *inter see. Calwell vs. Boyer*, - - - 136

2. The answer of a defendant, when responsive to the bill, is evidence in his favour, though the equity of the complainant's bill is grounded upon the allegation of fraud. *Dilley and Heckrotte vs. Barnard*, - 170

APPEAL.

1. During the pendency of a bill in the Court of Chancery, the legislature by the act of 1835, ch. 339, authorized any of the parties to the cause, to have transmitted to the Court of Appeals a transcript of the chancery proceedings, for the purpose of taking the opinion of the appellate court—touching the validity of certain acts of assembly involved in the said chancery proceedings; and such other points, as the parties to the controversy might by agreement have submitted to the Superior Court, with a provision that the opinion of the latter in the premises should be certified to the Court of Chancery, and be binding in that court as to the law thereby decided.

Under this law, and before a decree had been passed by the chancellor, one of the parties brought the record up, when it was *held*, that the law was unconstitutional and void, and the appeal dismissed. *Lawrence vs. Hicks, et al*, - - - 386

ASSUMPSIT.

1. Under the provisions of different acts of assembly, some of them passed more than a century ago, and when tobacco passed as currently as money, *assumpsit* will lie in this state, as well for tobacco, (where the contract is for payment in tobacco,) as for current money, and in some such cases, judgments have been rendered for tobacco. *Marshall vs. McPherson*, - 333
2. A widow having a right of dower in the lands of her deceased husband, may, instead of suing for, or receiving an assignment of her dower, by arrangement with the heir at law, or devisee, suffer him to rent out the lands, with the understanding, that she, in lieu of her dower,

is to receive her proportion, or one-third of the annual rent. In which case, if the heir at law, or devisee rents out the lands, and receives the rents, and keeps from the widow her just proportion, she may recover in *assumpsit*. And if she marry again, her husband having an interest in the land, by virtue of his wife's right of dower, may in lieu of an assignment of dower make a like arrangement and recover his just proportion of the rents received to his use, in the life-time of his wife, in an action of *assumpsit*, brought either before or after her death, - - - - - *Ib.*

3. Upon the evidence in this case, it was competent for the jury to have found such an arrangement, - *Ib.*

AUDITOR.

See Pleas and Pleadings, 12, 13.

BANKS.

See Usage, 1, 2, 3.

BRITISH STATUTES.

See Acts of Assembly, 1.

CASES EXPLAINED OR OVER- RULED.

1. The case of *Stiger vs. Hillen*, 5 *Gill and John*. 133, explained in relation to recovery of damages from the alienee of demandant's husband. *Sellman vs. Bowen*, 50
- See Devise, 4.

CHARITABLE MARINE SOCIETY.

See Executors and administrators, 2, 4.

CLERKS AND REGISTERS.

1. The duty required of clerks and registers by the seventh section of the act of 1817, ch 119, to make up the records of the judgments, &c. therein mentioned, within twelve months, was not to give validity to such judgments, &c. but for security, and to furnish the ready and convenient means of evidence in other courts. *Boteler and Bell vs. State*, - - - - - 359

CONSTRUCTION.

See Slaves, 4.

CONSTITUTIONAL LAW.

1. During the pendency of a bill in the court of Chancery, the legislature by the act of 1835, ch. 339, authorized any of the parties to the cause, to have transmitted to the court of Appeals a transcript of the chancery proceedings, for the purpose of taking the opinion of the appellate court—touching the validity of certain acts of assembly involved in the said chancery proceedings; and such other points, as the parties to the controversy might by agreement have submitted to the superior Court with a provision that, the opinion of the latter in the premises should be certified to the court of Chancery, and be binding in that court as to the law thereby decided.

Under this law, and before a decree had been passed by the chancellor, one of the parties brought the record up, when it was *held*, that the law was unconstitutional and void, and the appeal dismissed. *Lawrence vs. Hicks, et al.*, - - - 386

CORPORATION.

1. Subscribers under a charter creating a company to make a road, and before such road is located—only look to a location in conformity with the terms and intention of the charter. *Williamsport and Hagerstown Turnpike Co. vs. Hollman*, - - - - - 75
2. When a charter directs the officers of the corporation to appoint commissioners to lay out a road in the *nearest and best direction* between two points, and they proceeded to mark and lay out the road accordingly, it is no deviation from the charter, that the managers alter the location at a particular part so as to shorten the road, - - - - *Ib.*
3. Where the general object and design of a charter is to create a company to transport passengers and merchandise from B. to P. and the company appoints an agent, such agency, unless otherwise proven, is limited to the business of the company, connected with, or relating to such object and design. *The Pennsylvania, &c. Co. vs. Dandridge*, 248
4. Where a company was incorporated, “for the purpose of establishing and conducting a line or

lines of steamboats, vessels, and stages, or other carriages, between P. and B. for the conveyance of passengers, and transportation of merchandise and other articles,” a contract by such company, for the breaking of ice and towing vessels through the track thus broken, such vessels being bound for V. is invalid, and cannot be enforced against them, - - - - - *Ib.*

5. Corporations are not only incapable of making contracts which are forbidden by their charters, but in general they can make none, which are not necessary, either directly or indirectly to effect the objects of their creation, - - - - - *Ib.*
6. The circumstance that a corporation has entered into a contract, does not estop it from denying its competency to do so in an action brought against it, founded upon such contract. If such was the case, in reference to the corporation, the estoppel would apply equally to the other contracting party, and thus in effect, limitations upon the powers of corporations would be of no avail, - *Ib.*
7. If the defendants in this case had been, by their charter, authorized to make with the plaintiff a contract to take the vessel, on board of which his merchandise was laden, through the ice, and there was no express agreement that they would be responsible to the plaintiff, for all losses or injuries which might arise, if the said vessel was not carried through in safety; then the defendants were only bound to use reasonable efforts, care, and diligence, and not bound to the extent of common carriers, - - - - *Ib.*
8. In such case if the loss does not result from the want of care and diligence on the part of the defendants, but from the default or omission of the agents of the plaintiff to avail themselves of the means of safety, when fully apprised of the danger to which the property is exposed, the defendants would not be liable, - - - - - *Ib.*
9. The county court in instructing the jury, as to the facts which it would be necessary to find, to shew an adoption and ratification by the defendants, of the contract alleged to have been made by their agent, said, that if the consideration for

such contract had been received by the agent, and paid over to the defendants, who retained the same, that then the said facts are in law an adoption of the contract, and as binding on them as if a previous authority had been given the agent. This instruction was held to be erroneous; first, because the jury was not required to find, that the defendants *knew* on what account the money was paid them,—and second, that the defendants knew the terms of the contract on which the money was received, - *Ib.*
See Evidence, 17.

COUNTY COURT.

1. The jurisdiction given to the county courts, to review, confirm or set aside inquisitions had, under the provisions of the law authorizing the appellant to condemn land, for the construction of its road, is special and limited, and from its decisions no appeal lies to any other court. *The Wilmington, &c. Rail Road Co. vs. Condon*, - - 443
2. Where the company, subsequent to such inquisition, occupied the land condemned and commenced the construction of their road, *Cecil county court*, (*Chambers, Ch. J. and Hopper and Eccleston, A. J's.*) refused to hear evidence in support of objections filed by the company to the inquisition, and confirmed it. *Ib.*

COSTS.

1. The giving of costs is not a valid objection to a judgment against the *State*; but if it were, this court will regard it as a clerical error, and permit the party here, in whose favour it was rendered, to correct the error according to the provisions of the act of 1809, ch. 153, sec. 2. *State use Robey vs. Turner*, 125

COURT OF CHANCERY.

1. In an action at law for dower against the alienee of the demandant's husband, the defendant pleaded the non-seizure of the husband during the coverture. The verdict on that issue and the judgment was for the demandant. Upon a bill in equity between the same parties, to recover mesne profits, it was held, that the proceedings at law were conclusive evidence of the

seizin of the demandant's husband, and evidence that in the first proceeding, her marriage was admitted. *Sellman vs. Bowen*, - - - 50

2. In ordinary applications to equity for a decree for dower, and for rents and profits, where the seizin of the husband is denied, it is the course of that court to send the parties to law, to litigate the legal question, while in the meantime, they retain the bill, - - - *Ib.*
3. A widow can only, in equity, recover damages from the alienee of her husband, for the detention of her dower. A court of law cannot award them, - - - *Ib.*
4. The alienee of a husband seized of land, after the husband's death, who receives the rents and profits, is considered in equity as a trustee or bailiff to the extent of the widow's claim for dower, and cannot defeat the claim for mesne profits by pleading limitations, - - - *Ib.*
5. A widow who sues the alienee of her husband, at law for dower, may after her recovery, then sue him in equity for rents and profits, - *Ib.*
6. Rents and profits are decreed to the widow of one seized during coverture, as against his alienee, from the time of demand made by the widow, and are estimated according to the improved value of the premises and from the time of the improvements, if any, were made, - - - *Ib.*
7. The act of 1825, ch. 117, does not require exceptions to be filed, to the auditor's statement, made for the purpose of exhibiting the rights of the parties, as they had been solemnly adjudicated by the chancellor by a previous order. *Miller vs. Allison, et al*, - - - 35
8. The ordinary statements of the views and opinions of the auditor upon the rights of the parties, designed to give them an opportunity, more distinctly to present to the chancellor the matters in contest, are within the act of 1825, ch. 117, and should be excepted to in the Court of Chancery, - - - *Ib.*
9. Where a party reaps profits by his own voluntary act, founded upon contract with another, he is not as against the creditors of such other party at liberty to vacate his contract to their prejudice, and claim to participate in equity and conscience, upon the insolvency of

- such other party, equally with his creditors in his estate and in opposition to the terms and effect of the original agreement. *Maryland Savings Institution vs. Schroeder*, 93
10. A court of equity decrees the specific execution of a parol agreement, on the ground of part performance, and notwithstanding the express provisions of the statute of frauds. This is on the ground of fraud in refusing to perform after performance by the other party, and to prevent the statute from being an engine of that fraud, which it was enacted to prevent, - *Ib.*
11. It is no objection to a decree for the sale of real estate, for the purpose of distributing the proceeds among the parties entitled, that the interest of a party to the proceedings to a portion of the proceeds, has not been sustained by proof. *Cahell vs. Boyer*, - - - 136
12. It in such a case however, is necessary that the parties litigant, should prove their title to the property to be sold; but when there was nothing in the proceedings putting their title in issue, *prima facie* evidence was deemed sufficient to support the jurisdiction of the court, - - - - *Ib.*
13. Since the act of 1832, ch. 302, all objections to the competency of witnesses, and the admissibility of evidence must be raised by exceptions filed in the court of Chancery, or county courts as courts of equity; and no point relating to either shall be raised, or noticed, or determined, or acted upon, by the Court of Appeals, unless it shall clearly appear in the record, that such point had been raised by exceptions as aforesaid, - - - - *Ib.*
14. Where the court below certified, that a bill had been taken *pro confesso*, against a defendant, and an *ex parte* commission issued, because he had failed to answer according to the rules of the court; and such rules were not in the record, nor the time of holding its intermediate equity terms prescribed by law; this court will assume the verity of such certificate, and presume that the order *pro confesso*, was legitimately passed, - - - *Ib.*
15. When a supplemental bill is filed to bring in a new party in interest, such new party alone should be made to respond to it, - - - *Ib.*
16. The answer of one defendant is not evidence against a co-defendant, even as to matters in contest between the complainant and such co-defendant; and much less would such answer be evidence, in adjudicating upon the conflicting claims of the defendant's *inter se*, - *Ib.*
17. A court of equity has no jurisdiction over what is called "good will," and where a bill was filed upon a contract alleged to be of that description, claiming of the purchaser or party in possession, an account of rents and profits, arising from certain stalls in market houses in the City of Baltimore, the bill was dismissed, but under the circumstances of the case, without costs. *Zeigler vs. Sentzner*, 150
18. For the violation of such a contract, if the subject be one fit for a contract, the remedy is at law, where damages may be given by a jury, - - - - *Ib.*
19. That a judgment *mala fide*, and by surprise, arising from the fraudulent and deceptive conduct of the adverse party, by which the complainant has been lulled into a security fatal to his rights, would be against conscience, and ought to be enjoined by a court of Chancery, is a clear proposition; but it is equally clear, that no person can enlist a court of equity in his favour, unless he enters its doors with clean hands; and when he seeks to be relieved against injustice, arising from the bad faith of his adversary, he ought not to be obnoxious to the same imputation himself. *Dilly vs. Heckrotte and Barnard*, - - - 170
20. No man is entitled to the aid of a court of equity when that aid becomes necessary by his own fault. *Ib.*
21. The answer of a defendant, when responsive to the bill, is evidence in his favour, though the equity of the complainant's bill is grounded upon the allegation of fraud, *Ib.*
22. In cases in which courts of equity and law have concurrent jurisdiction, as in matters of account, it seems, that equity will not relieve against a judgment on the mere ground of the difficulty of making a defence at law, but the case must be one where it was impossible to do so, - - - - *Ib.*
23. If facts essential to the case of either party rest in the knowledge

- of the opposite party, it is too late after a trial at law, for the losing party to apply to a court of equity for relief upon that ground. He should have filed his bill for a discovery before the trial, - - - *Ib.*
24. After a verdict and judgment at law, the legal intendment or presumption is, that every thing was proved at the trial which was necessary to maintain the suit. *Per Th. Buchanan, A. J.* - - - *Ib.*
25. If a complainant omits to state an equitable case in his bill, the court cannot notice it, though established by the proof, - - - - - *Ib.*
26. The rule is well established in this state, that the charges, or allegations of a bill, not admitted by the answer, must be proved, *Ib.*
27. To warrant a court of Chancery in issuing an injunction, strong *prima facie* evidence of the facts on which the complainant's equity rests must be presented to the court to induce its action. *Union Bank of Maryland vs. Poulthney,* - - 324
28. In such a proceeding, the mere oath of a party, as to the existence of a debt, of which he holds in his possession the written evidence, without producing it, should not be regarded by the chancellor as any proof of such debt, - - - *Ib.*
29. Where the existence of a debt depends on a written instrument, of which the complainant is presumed to be in possession, it should be exhibited with the bill or a satisfactory reason assigned for its non-production, - - - - - *Ib.*
30. A party holding a prior lien on lands has no right to prevent by injunction a subsequent judgment creditor from enforcing his judgment by execution; as a sale under such execution could not defeat or impair his prior lien; but would leave him at law, and in equity, in the same condition as if such sale had never taken place, - - - *Ib.*
31. The great purpose and object of a court of equity in assuming jurisdiction to restrain proceedings at law, is to afford a more plain, adequate and complete remedy for the wrong complained of than the party can have at law. *Glenn and Kennedy vs. Fowler, et al.,* - - 340
32. Where a statute has made provision for all the circumstances of a particular case, no relief in equity can be afforded, although the provisions of the statute may conflict with the notions of natural equity and justice entertained by a court of equity.
33. The several acts of assembly erecting the system which exists in *Baltimore* city and county, in relation to insolvent debtors, has in the first instance, invested the commissioners with the sole and exclusive jurisdiction upon the subject of appointing permanent trustees: and over the exercise of that power the court of Chancery can exert no control to supervise or reverse their appointment for any pretended error of judgment, - - - - - *Ib.*
34. Courts of equity have sometimes interposed to prohibit proceedings at law, upon the ground that having possessed itself of the general subject, by an application for its aid, to compel a disclosure or for the exercise of some other admitted jurisdiction, it will dispose of the whole matter and thus avoid a multiplicity of suits, - - - - - *Ib.*
35. The grant of a several fishery, in a public navigable river, cannot be presumed from the mere uninterrupted use and enjoyment of the right of fishing for more than twenty years. *Delaware and Maryland Rail Road Co. vs. Stump,* - 479
36. If such presumption can be made at all, from the fact of such use and enjoyment, it must be shown to have been in exclusion of the right of others, and the absence of an averment to that effect, in a bill praying for an injunction to protect such right, was held to be fatal to the complainant's case, - - - *Ib.*
37. Though the grant of a right to erect wharves, and employ steamboats, if destructive of the paramount right of general navigation and fishing, may be void; the remedy is not by injunction, which is only applicable to special injuries in violation of private rights. Public grievances are not to be redressed by individuals at their own suit. *Ib.*
- See Lien,
Mortgage, 1, 2, 3.
Orphans court, 12, 13, 15.
- DEVISE.
1. J. S. died in 1797, intestate, and seized of two parcels of land, which had descended to her from her father, leaving an only brother, her heir at

- law. Upon his death without issue, and intestate, it was *Held*, that though the descent from his sister to him was an immediate descent, according to the principles of common law, it was also mediate from the father, from whom the brother derived his inheritable blood; and was therefore a descent upon the part of his father, and embraced by the act of descents of 1786, ch. 45. *Stewart's lessee vs. Jones*, 1
2. Though according to the principles of the *English* law of descents, the descent from brother to brother is immediate, and title may be made by one brother to another, without mentioning their common ancestor; yet such ancestor is regarded as the fountain of inheritable blood, and consequently the descent is mediate from him, - - - - - *Ib.*
 3. The legislature of this *State*, by the act of 1786, ch. 45, changed the *English* common law of descents in many of its essential features, and imparted new inheritable capacities unknown to that law. On failure of lineal heirs in the descending line, if the estate descended to the intestate on the part of the father, it directs that it shall descend to the brothers and sisters of the blood of the father, without discriminating between the whole, and the half bloods; showing manifestly, that though the descent is immediate from the person who died seized, the inheritable blood is derived from the ancestor, from whom the estate descended to such person, - - *Ib.*
 4. Distinction pointed out between the case of *Stewart's lessee vs. Evans*, 3 *Har. and John*. 287, and *Hall vs. Jacobs*, 4 *Ib.* 245, and the decision in the latter case, shown to be founded upon the circumstance, that the estate was acquired by purchase, by the party from whom the descent was traced, - - - *Ib.*
 5. H, by his will dated in 1828, devised and bequeathed to his wife, one-third part of his real and personal estate, and to his two sons, *Henry* and *Nathan*, in fee simple, all his real property in the city of *Annapolis*. To another son, and his heirs for ever, he gave his plantation in *Anne Arundel* county; and all the rest and residue of his estate, both real and personal, after his wife's third should be taken out, he devised and bequeathed to his three

sons, share and share alike. *Held*, that under this will, the wife was entitled to that share of her husband's estate, which the law gave her, and no more; that is, one-third of the real for life, and one-third of the personal absolutely. *Hammond vs. Hammond*, - - - 437

6. The word "estate" in a devise, will be *descriptive* of the subject of property, or the *quantum* of interest, according to the context, and will pass a fee, when the intention of the testator does not restrict it, to import a description, rather than an interest, - - - - - *Ib.*
7. Since the act of 1825, ch. 119, a general devise in which words of limitation, or perpetuity are omitted, will pass the whole interest of the testator, upon the assumption that he so intended; that assumed intention, however, being subject to be controlled, by evidence of a contrary intention, indicated by a devise over, by words of limitation, or otherwise, - - - - - *Ib.*

DOWER.

1. In an action at law for dower against the alienee of the demandant's husband, the defendant pleaded the non-seizure of the husband during the coverture. The verdict on that issue and the judgment was for the demandant. Upon a bill in equity between the same parties, to recover mesne profits, it was *held*, that the proceedings at law were conclusive evidence of the seizin of the demandant's husband, and evidence that in the first proceeding, her marriage was admitted. *Sellman vs. Bowen*, 50
2. In ordinary applications to equity for a decree for dower, and for rents and profits, where the seizin of the husband is denied, it is the course of that court to send the parties to law, to litigate the legal question, while in the meantime, they retain the bill, - - - - - *Ib.*
3. A widow can only, in equity, recover damages from the alienee of her husband, for the detention of her dower. A court of law cannot award them, - - - - - *Ib.*
4. The alienee of a husband seized of land, after the husband's death, who receives the rents and profits, is considered in equity as a trustee or bailiff to the extent of the widow's

claim for dower, and cannot defeat the claim for mesne profits by pleading limitations, - - - *Ib.*

5. A widow who sues the alienee of her husband, at law for dower, may after her recovery, then sue him in equity for rents and profits, *Ib.*
6. Rents and profits are decreed to the widow of one seized during coverture, as against his alienee, from the time of demand made by the widow, and are estimated according to the improved value of the premises and from the time the improvements, if any, were made, *Ib.*

7. A widow having a right of dower in the lands of her deceased husband, may, instead of suing for, or receiving an assignment of her dower, by arrangement with the heir at law, or devisee, suffer him to rent out the lands, with the understanding, that she, in lieu of her dower, is to receive her proportion, or one-third of the annual rent. In which case, if the heir at law, or devisee rents out the lands, and receives the rents, and keeps from the widow her just proportion, she may recover in *assumpsit*. And if she marry again, her husband having an interest in the land, by virtue of his wife's right of dower, may in lieu of an assignment of dower make a like arrangement and recover his just proportion of the rents received to his use, in the life-time of his wife, in an action of *assumpsit*, brought either before or after her death.

Upon the evidence in this case, it was competent for the jury to have found such an arrangement. *Marshall vs. McPherson*, - - - 333
See Devise, 6.

EJECTMENT.

1. In an action of ejectment, by a party claiming under a sheriff's sale, the following description in the schedule of the property sold, was held to be sufficient. "To one—of land called and known by the name of "Indian Creek with addition," containing 217 acres, more or less." *Marshall's lessee vs. Greenfield*, - - - - - 349

EQUITABLE INTEREST IN LAND.

1. When a *fi. fa.* on a junior judg-

ment is levied on an equitable interest in the lands of the debtor, and subsequently a *fi. fa.* on a senior judgment comes to the sheriff's hands, the senior judgment must be first satisfied. *Miller vs. Allison*, 35

2. Equitable estates are primarily liable to sale under *fi. fa.* in the same manner as legal estates are. *McMechen vs. Marman*, - - 57

ENROLMENT.

See Sales of Personal Property.

EVIDENCE.

1. General reputation, cohabitation, and acknowledgment are sufficient evidence of marriage in all cases, except in actions for criminal conversation and in prosecutions for bigamy. *Sellman vs. Bowen*, 50
2. In an action at law for dower against the alienee of the demandant's husband, the defendant pleaded the non-seizin of the husband during the coverture. The verdict on that issue, and the judgment was for the demandant. Upon a bill in equity between the same parties to recover the mesne profits, it was held, that the proceedings at law were conclusive evidence of the seizin of the husband; and evidence that in the first proceeding her marriage was admitted, - - *Ib.*
3. By the act of 1798, ch. 101, sub ch. 14, sec. 4, a person appointed guardian to a minor by the Orphans' court, is not qualified to act as such, until he has bonded, and such qualification can only be established by the adduction of the bond, or office copy thereof, unless it has been lost and the record destroyed, when proof of an inferior character might perhaps be admissible. *Clark vs. State*, - - - - - 111
4. The bond itself, or an office copy is the best evidence, and must be shown to be lost or destroyed before inferior proof can be resorted to, - - - - - *Ib.*
5. Where by the pleadings the issue was, whether the guardian had collected and received certain moneys claimed for his ward, evidence proposed to be offered by the defendant to establish the fact that the guardian had discharged himself, by the payment of the amount proved to be in his hands to a successor legally qualified to act, was held to

- be foreign to the issue, and therefore inadmissible, - - - - *Ib.*
6. Evidence of a variety of facts and circumstances offered by the plaintiff, to repel the proof which the defendant proposed to adduce, was also held to be inadmissible as foreign to the issue, and the county court erred in admitting it; but as such proof could not have influenced the minds of the jury in finding upon the issue submitted to them, this court would not for such error reverse the judgment, the plaintiff in whose favour the verdict was rendered having offered uncontroverted evidence in support of the issue on his part, - - - - *Ib.*
 7. In an action of assumpsit on an open account, the plaintiff to remove the bar of the statute of limitations, proved that within three years of the commencement of the suit, the defendant said to the witness, it was his impression the money had been paid by his, defendant's father. That if his father had paid it, he could find, he supposed, the receipt on searching his father's papers; and if he could not find the receipt, he would settle it; and promised to make a search and inform the witness. *Held*, that the evidence was sufficient to remove the bar. *Sothoron vs. Hardy*, 133
 8. Proof that a negro woman had been living and acting as a free person from the 27th of July, 1830, to the 11th of October, 1836, does not furnish any evidence whatever in support of her claim to freedom, unless it can be shown, that the party entitled to her custody and service, knew of her place of residence during the period of her so living and acting. *Wilson vs. Negro Ann Barnet*, - - - - - 159
 9. Thus, where it was in proof, that the petitioner, who was born the slave of a testatrix, who lived and died on the *Eastern Shore of Maryland*, lived as a free woman in the *City of Baltimore*, for the period above mentioned, and who by the will of the testatrix was entitled to her freedom if the residue of the personal estate was sufficient to pay her debts: *Held*, that her so living, did not furnish *prima facie* evidence of the sufficiency of said residue for that purpose, or any evidence upon which a direction to that effect could be given to the jury, there being no proof that the personal representative of the testatrix was aware of her residence, *Ib.*
 10. An order passed by the Orphans court, directing the administrator to sell the slaves of the testatrix, is not evidence of the insufficiency of the other personal assets, in opposition to the petitioner's right to freedom, - - - - - *Ib.*
 11. The defendant having given notice to the plaintiff's attorney at 4 o'clock, *p. m.* on Monday, the first day of the term, to produce a paper to be read in the trial of the cause, which came on, on the following Wednesday; it was held to be sufficient notice to let in secondary evidence of its contents, though it was admitted that the paper was in the possession of the plaintiff himself, and that the attorney did not see him until the intervening Tuesday, at a quarter past 4 o'clock, *p. m.* *Divers vs. Fulton*, - 202
 12. Before secondary evidence of the contents of a written instrument can be offered, the notice to produce the original must appear to the court to be reasonable in point of time, so as to give the adverse party an opportunity to produce the paper called for, - - - - *Ib.*
 13. Where evidence had been offered for the purpose of establishing a parol gift of a negro slave by a deceased testatrix to the plaintiff; and the defendant had read to the jury a letter from the plaintiff to him, written subsequently to the date of the will of the testatrix, inconsistent with the idea of exclusive property in the plaintiff; the defendant was permitted to read the will, though executed after the alleged gift, for the purpose of explaining the plaintiff's letter, and showing his recognition of the right of the testatrix to bequeath the property, *Ib.*
 14. Where a party had offered evidence, without objection, of the consideration, amount, dates, and times of payment of two promissory notes, (not before the court,) and then proposed to prove, that they had been surrendered to the drawer, the one upon being paid, and the other upon being substituted by two other notes given in lieu of it; upon objection to the proposed proof of the surrender, because they were not

produced, and no notice had been given to produce them; *held*, that the proof was admissible. *Held* also, notwithstanding a similar objection, that evidence of the substitution of the two last notes, for the one surrendered, was likewise admissible. *Marfield vs. Davidson*, 209

15. To render the evidence of the surrender admissible, as a general rule, the notes surrendered must have been produced, but where their contents are proved by consent, the identity of the notes given, and those surrendered, is as certainly established, as if they were present in court, - - - - - *Ib.*

16. The admissibility of the proof of the substitution rests upon the same principle, that is, that evidence of the contents of the substituted notes, had been given without objection, *Ib.*

17. The agent, a stockholder, of an incorporated company, (the defendant in the action,) who made the contract with the plaintiff, is not a competent witness for said company in regard to such contract. In such a case, the witness has a direct interest in the event of the suit, independently of his acts as agent. *The Pennsylvania, &c. Co. vs. Dandridge*, - - - - - 248

18. All the surrounding circumstances of the transaction should be submitted to the jury, provided they can be established by competent means, and afford any fair presumption or inference as to the question in dispute. And in deciding upon the admissibility of such circumstances, it must be assumed, that the evidence proposed to be given would establish them to the satisfaction of the jury. *The Pennsylvania, &c. Co. vs. Dandridge*, 248

19. Evidence by a justice of the peace that, when called upon by parties to prepare conveyances for them, it was his habit to inquire whether they desired absolute, or conditional conveyances, that he had no doubt such inquiry was made in the present instance, and that he never failed to shape the paper according to the expressed purpose of the parties; and that he was also in the habit of reading the papers, after they were written, to those for whom they were prepared, and es-

pecially if they were workmen: *Held* to be inadmissible. *Pocock vs. Hendricks*, - - - - - 421

20. It is for the jury to decide whether a variety of facts and circumstances admissible as evidence, are sufficient, in point of fact, to prove that a bill of sale was fraudulently obtained, - - - - - *Ib.*

21. If the instrument under which the plaintiff claims in an action of *trover*, is proved, or conceded to have been obtained by fraud, it is of no validity; and the defendant may rely upon such invalidity as a bar to the action, - - - - - *Ib.*

22. Since the act of 1825, ch. 120, the execution of an instrument of writing, to which there is a subscribing witness, may be proved without calling such subscribing witness, though he is present in court at the time of the trial. *Pannell vs. Williams*, - - - - - 511

23. In an action upon a single bill, of which the plaintiff is in possession, proof of the defendant's signature is sufficient *prima facie* evidence of its due execution by delivery, to go to the jury, though the validity of the instrument is disputed by a general *non est factum* plea, - *Ib.*

EXCEPTIONS TO AUDITOR'S STATEMENT.

1. The act of 1825, ch. 117, does not require exceptions to be filed to the auditor's statement, made for the purpose of exhibiting the rights of the parties, as they have been solemnly adjudicated by the chancellor by a previous order. *Miller vs. Allison*, - - - - - 35

2. The ordinary statements of the views and opinions of the auditor upon the rights of the parties, designed to give them an opportunity, more distinctly to present to the chancellor the matters in contest, are within the act of 1825, ch. 117, and should be excepted to in the court of Chancery, - - - - - *Ib.*

EXECUTION.

1. When a *fi. fa.* on a junior judgment is levied on an equitable interest in the lands of the debtor, and subsequently a *fi. fa.* on a senior judgment, comes to the sheriff's hands, the senior judgment must be first satisfied. *Miller vs. Allison, et al.*, - - - - - 35

EXECUTORS AND ADMINISTRATORS.

1. The testamentary system admits no power of delegation in any person entitled to administration of the estate of a deceased party. *Hoffman vs. Gold*, - - - - - 79
2. The act of 1819, ch. 187, which declares, that when any seaman, &c. shall die intestate, &c. letters of administration upon his estate shall be granted, in preference, to some officer of *The Charitable Marine Society*, having no words giving it a retrospective operation; there being nothing in the nature of its enactments to demand it; and neither the interests of the Society, nor the security of the claim being dependent upon it, can according to its language, only have a prospective operation, - - - - - *Ib.*
3. The testamentary laws have made provision for every case to insure an administration with promptness. If a party dies leaving very near relations, they are to be summoned, if within the *State*, or an effort is to be made to summon them; more remote relations and creditors next have the preference, *if they apply*. In the absence of such application, the court can exercise a discretion, and in doing so, should undoubtedly, as a general rule pursue the policy of the system, and commit administration to the person having the greatest interest in the estate, *Ib.*
4. In 1835, application was made by an officer of *The Charitable Marine Society*, for letters of administration on the estate of a seaman, who died abroad, in —. This was resisted by H, having the funds of the deceased in his hands, and claiming to retain a portion of it for services rendered—the deceased having, no kindred. *Held*, that H, on proving himself to be a creditor, would be entitled to administration; and that in the absence of such proof, the *Orphans* court could grant letters in their discretion, - - - - - *Ib.*
5. The presumption of slavery arising from colour, upon an application for administration of an estate, is sufficiently rebutted in relation to the grant of letters, by the fact, that the deceased engaged in a voyage to foreign ports as a sailor, that his wages which constituted the known part of his estate, had been recovered at law in his name, and not been claimed by any owner after the lapse of many years, - - - *Ib.*
6. The master or owner of a slave may recover from one to whom letters of administration had been granted, and who had recovered in that character property due for the services of such slave, - - - *Ib.*
7. An order passed by the *Orphans* court directing the administrator to sell the slaves of the testatrix, is not evidence of the insufficiency of the other personal assets, in opposition to the petitioner's right to freedom. *Wilson vs. Negro Ann Barnet*, - - - - - 159
8. The *Orphans* courts have exclusive cognizance in the appointment of administrators, *de bonis non*, and where an executor, had not completed his trust, by the payment of all legacies, and the delivery over of the property in his hands to the persons entitled, the exercise of the power of appointment was held to be rightful. *Alexander vs. Stewart, et al*, - - - - - 226
9. It is the duty of an administrator, *de bonis non*, thus legitimately clothed with authority, to take possession of the effects of the deceased testator existing specifically; return an inventory thereof to the *Orphans* court, and to distribute the same among the parties entitled, according to their respective rights; and with the due exercise of this lawful authority, no tribunal can rightfully interfere, *Ib.*
10. The inadequacy of the sureties in an administration bond, may under certain circumstances, furnish a basis for the ancillary jurisdiction of a court of equity in restraining the authority of an administrator, until the *Orphans* court can inquire into the subject, and secure the parties concerned, by demanding new security, - - - - - *Ib.*
11. So the *Orphans* courts are the exclusive judges of the sufficiency of the penalty of the bonds required of executors and administrators, and the court of Chancery cannot in this respect review their determinations, - - - - - *Ib.*
12. Property remaining specifically after the death of the original executor or administrator, is unadmi-

nistered property; and the appointment of an administrator, *de bonis non*, in such case, is indispensably necessary to give title to the distributees, even though all the debts are paid, and if, in such circumstances, the administrator of the first executor transfers the property to the distributees, their possession is liable to be divested by the subsequent grant of letters *de bonis non*, - - - - - *Ib.*

13. A court of Chancery has no power to vest property so situated in the distributees, except through the medium of such administrator, whose duty it is, after the return of an inventory, if the debts are paid, to transfer the property to the parties entitled without delay, - - - *Ib.*

FIERI FACIAS.

1. When a *fi. fa.* on a junior judgment is levied on an equitable interest in the lands of the debtor, and subsequently a *fi. fa.* on a senior judgment comes to the sheriff's hands, the senior judgment must be first satisfied. *Miller vs. Allison, et al*, 35
 2. Equitable estates are primarily liable to sale under a *fi. fa.* in the same manner as legal estates are. *McMeehan vs. Marman*, - - - 57
 3. As soon as a writ of *feri facias* is delivered to a sheriff, in contemplation of law, it attaches itself to the bond, which gives him authority to act as such for the time being, and if a default is committed upon such writ, the party injured must sue that bond. *State vs. Robey vs. Turner*, - - - - - 125
 4. Two writs of *feri facias*, at suit of the same party, were placed in the hands of the sheriff on the 24th of November, 1828, and laid, the one on the 6th of December, of the same year, the other, on the 21st of January, following. On the 17th of May, 1830, the sheriff levied upon these writs the sum of \$1,100, which he made default in not paying over, and the party entitled, thereupon brought suit upon his bond executed on the 8th of December, 1829. *Held*, that the right to recover was not upon the bond sued on; but that the remedy of the party was upon that bond, which clothed the sheriff with official authority at the time the writs were placed in his hands, - - - *Ib.*
- See Habere, facias possessionem*, 1

FISHERY.

1. The grant of a several fishery, in a public navigable river, cannot be presumed from the mere uninterrupted use and enjoyment of the right of fishing for more than twenty years. *Delaware and Maryland Rail Road Co. vs. Stump*, - - - 479
2. If such presumption can be made at all, from the fact of such use and enjoyment, it must be shown to have been in exclusion of the right of others, and the absence of an averment to that effect, in a bill praying for an injunction to protect such right, was held to be fatal to the complainant's case, - - - *Ib.*
3. Though the grant of a right to erect wharves, and employ steamboats, if destructive of the paramount right of general navigation and fishing, may be void; the remedy is not by injunction, which is only applicable to special injuries in violation of private rights. Public grievances are not to be redressed by individuals at their own suit, - - - *Ib.*

GOOD WILL.

1. A court of equity has no jurisdiction over what is called "good will," and where a bill was filed upon a contract alleged to be of that description, claiming of the purchaser or party in possession, an account of rents and profits, arising from certain stalls in market houses in the city of Baltimore, the bill was dismissed, but under the circumstances of the case, without costs. *Zeigler vs. Sentzner*, 150
2. For the violation of such a contract, if the subject be one fit for a contract, the remedy is at law, where damages may be given by a jury, - - - - - *Ib.*

GUARDIAN AND WARD.

1. By the act of 1798, ch. 101, sub. ch. 14, sec. 4, a person appointed guardian to a minor by the Orphans court, is not qualified to act as such, until he has bonded, and such qualification can only be established by the adduction of the bond, or office copy thereof, unless it has been lost and the record destroyed, when proof of an inferior character might perhaps be admissible. *Clarke vs. State*, - - - - - 111
2. The bond itself, or an office copy, is the best evidence, and must be

shown to be lost or destroyed before inferior proof can be resorted to, - - - - - *Ib.*

3. Where by the pleadings the issue was, whether the guardian had collected and received certain moneys claimed for his ward, evidence proposed to be offered by the defendant to establish the fact that the guardian had discharged himself, by the payment of the amount proved to be in his hands to a successor legally qualified to act, was held to be foreign to the issue, and therefore inadmissible, - - - - - *Ib.*

4. Though this court feels itself bound to shield a trustee, in the honest and faithful discharge of his duties, it is also bound to exercise a vigilant care in protecting the interests of those who, from their tender years are incapable of protecting themselves. *Jenkins vs. Walter*, 218

5. Thus where a guardian had received a sum of money belonging to his ward, and on the day of its receipt, had deposited it in a banking institution then in good credit, but which subsequently failed, and taken a certificate therefor payable to himself, or order; it was held, that the loss resulting from the failure of the bank should fall upon him, though on the day of the deposit, by endorsement on the certificate he declared it to be the property of his ward, and placed in bank for his benefit, - - - - - *Ib.*

6. If in such a case the party making the deposit had failed before the bank, the money deposited would have enured to the benefit of his creditors, and the ward must have sustained the loss; and although the exhibition of the endorsement on the certificate might have defeated the claims of creditors, the bank itself might have applied the fund in satisfaction of any claim due it from the depositor, - - - - - *Ib.*

7. *Quere*, whether the guardian would have been protected, if without the sanction of the Orphans court, he had deposited the money in the name of his ward, - - - - - *Ib.*

HABERE FACIAS POSSESSIONEM.

1. The purchaser of land sold under a *feri facias*, applied to the county court for a writ of *habere facias*

possessionem, under the act of 1825, ch. 103, against one in possession, under title subsequent to the rendition of the judgment on which the *fi. fa.* issued. It appeared that the judgment debtor had only an equitable interest in the land levied on, holding a bond of conveyance from the owner of the fee, and which bond he had assigned to the tenant in possession before the *fi. fa.* issued. Upon due proof of demand and failure to surrender possession to the purchaser, it was held, that he was entitled to a writ of *habere facias possessionem*. *McMechen vs. Marman*, - - - - - 57
See Practice, 1.

INSOLVENT DEBTOR.

1. The several acts of assembly erecting the system which exists in Baltimore city and county, in relation to insolvent debtors, has in the first instance, invested the commissioners with the sole and exclusive jurisdiction upon the subject of appointing permanent trustees; and over the exercise of that power the court of Chancery can exert no control to supervise or reverse their appointment for any pretended error of judgment. *Glenn and Kennedy vs. Fowler, et al*, - - - - - 340

INJUNCTION.

1. The depositor of a sum, weekly, in an incorporated Savings Institution, which he was entitled to withdraw at pleasure, agreed with and requested the institution to convert and vest his deposits permanently into stock of said company. Upon the conversion he received increased dividends and participated in its entire profits. The institution becoming insolvent, and receiving in the course of its settlements with its debtors, its own certificates of deposit in payment, which would absorb all its available funds. The depositor on the ground that a conversion of his money into stock was in violation of the charter of the company, applied for an injunction. Held, that whether the charter authorized it or not, he was not entitled to the restraining power of the court. *The Maryland Savings Institution vs. Schroeder*, - - - 93
2. An application to a court of Chancery for the exercise of its prohibi-

- tory powers or restrictive energies, must come recommended by the dictates of conscience and be sanctioned by the clearest principles of justice, - - - - - *Ib.*
3. Appeals from orders dissolving injunctions not prosecuted under the act of 1832, ch. 197, will not lie. *Marshall vs. The Mayor, &c. of Baltimore*, - - - - - 214
4. To warrant a court of Chancery in issuing an injunction, strong *prima facie* evidence of the facts on which the complainant's equity rests must be presented to the court to induce its action. *Union Bank of Maryland vs. Poultney, et al*, - - 324
5. In such a proceeding, the mere oath of a party, as to the existence of a debt, of which he holds in his possession the written evidence, without producing it, should not be regarded by the chancellor as any proof of such debt, - - - *Ib.*
6. Where the existence of a debt depends on a written instrument, of which the complainant is presumed to be in possession, it should be exhibited with the bill or a satisfactory reason assigned for its non-production, - - - - - *Ib.*
7. A party holding a prior lien on lands has no right to prevent by injunction a subsequent judgment creditor from enforcing his judgment by execution; as a sale under such execution could not defeat or impair his prior lien; but would leave him at law, and in equity, in the same condition as if such sale had never taken place, - - *Ib.*
- See Fishery, 2, 3.*

INSURANCE.

1. In an action of covenant upon a policy of insurance, in which the words "with liberty," of a port were used, it was held, that those words, confer a power subordinate to the general course of the voyage. *Allegre's Adm'rs vs. Maryland Ins. Co.* - - - - - 190
2. They do not necessarily import an intention to trade at the port mentioned; nor do they amount to an assurance, or intimation to the underwriter, that the assured looked to the port of privilege under any circumstances in the contemplation of the parties, as that, at which the voyage was designed to terminate. *Ib.*

3. Mere awakening circumstances, inciting the underwriter to inquiry, are not sufficient to relieve the assured from the necessity of making known to the former the fact, that the cargo for insurance consisted of live stock. A knowledge of this fact, previous to the insurance, must be shewn in the underwriter, or an imputed knowledge, by proving, that on the voyage insured, live stock is the only article of commerce; and such imputed knowledge does not result from the introduction into the policy of the words, "with liberty," of the port, to which such exclusive trade is shewn, - - - - - *Ib.*
4. When insurance is demanded on live stock, it is the duty of the assured to notify the assurers of the nature of the cargo, and his failure to do so, vitiates the policy, *Ib.*

ISSUE OF FEMALE SLAVE.

See Mortgage, 1.

JUDGMENT.

See Fieri facias, 1.

JUDICIAL SALE.

1. A judicial sale, made by a sheriff, for the purpose of carrying into effect the judgment of a competent tribunal, is a proceeding which the law regards with favour, and although it will not give effect to an instrument or paper, executed by such officer, if its terms are unmeaning, or so entirely vague as to make it uncertain what was intended; yet every reasonable intention will be made to secure *bona fide* purchasers, and to effectuate the object, which it was the duty, and as the law presumes, the design of the officer to accomplish. *Marshall's Lessee vs. Greenfield*, 349
2. The presumption in such a case is, at least, as proper and strong as in the case of a grantee claiming against a grantor, when the utmost effect is given to the terms of the grant, *ut res magis valeat quam pereat*, - - - - - *Ib.*
3. In an action of ejectment by a party claiming under a sheriff's sale, the following description, in the schedule of the property sold, was held to be sufficient:
- "To one, of land, called and known

by the name of 'Indian Creek, with Addition,' containing 217 acres, more or less," - - - *Ib.*

JURISDICTION.

1. The jurisdiction given to the county courts, to review, confirm, or set aside inquisitions had, under the provisions of the law authorizing the appellant to condemn land, for the construction of its road, is special and limited, and from its decisions, no appeal lies to any other court. *The Wilmington, &c. Rail Road Co. vs. Condon*, - - - 443
2. Where the company, subsequent to such inquisition, occupied the land condemned and commenced the construction of their road, *Cecil county court*, (*Chambers, Ch. J. and Hopper and Eccleston, A. J's.*) refused to hear evidence in support of objections filed by the company to the inquisition, and confirmed it, *Ib.*

LIEN.

1. R, the devisee and owner of a tract of land incumbered with the payment of a legacy, sold and conveyed it to E, with a general warranty. The purchaser executed a mortgage to R, to secure the unpaid part of the purchase money. After this A, sold land to R, and took from him an assignment of E's mortgage, to secure his consideration money, which declared that A, received the assignment of the mortgage without any sort of recourse to R, for the payment of the mortgaged debt, or any part thereof, he relying wholly upon the mortgage. On a bill filed by A, against R, to enforce an alleged lien on the tract sold by A, for the unpaid purchase money, it was held, that A, had no lien thereon. *Richardson vs. Ridgely, et al*, - - - - - 87

LIMITATIONS.

1. The alienee of the husband seized of land, after the husband's death, who receives the rents and profits is considered in equity as a trustee and bailiff to the extent of the widow's claim for dower, and cannot defeat the claim for mesne profits by pleading limitations. *Sellman vs. Bowen*, - - - - - 50
2. In an action of *assumpsit* on an open account, the plaintiff to re-

move the bar of the statute of limitations, proved that within three years of the commencement of the suit, the defendant said to the witness, it was his impression the money had been paid by his, defendant's, father. That if his father had paid it, he could find, he supposed, the receipt on searching his father's papers; and if he could not find the receipt he would settle it; and promised to make a search and inform the witness. *Held*, that the evidence was sufficient to remove the bar. *Sothoron vs. Hardy*, 133

3. A usage established by proof, that current deposites made in a bank, and the proceeds of notes and drafts placed for collection, are to be paid to the depositor, upon demand, at the counter of the bank, would prevent the running of the act of limitations against such depositor, until payment of his claim had been refused, or some act done, with his knowledge, dispensing with the necessity of a demand, *Planters' Bank vs. Farmers and Mechanics' Bank*, - - - - - 449
4. Such dispensation would be furnished by the suspension of specie payments, and discontinuance of banking operations, by the bank, provided, those acts were known to the plaintiff, and from the time of such knowledge, the statute of limitations would begin to run, *Ib.*
5. Mere fiduciary relations between the parties to a suit, in respect to the matters in controversy, will not *per se*, prevent the running of the act of limitations. In a court of law there is no such bar to the operation of the act of *trusts*, otherwise than as shewing when the right of action accrued, - - - *Ib.*
See Mortgage, 3.

MANUMISSION OF SLAVES.

See Petition for Freedom.

MONEY HAD AND RECEIVED.

1. Though the indebtedness of the defendant, may be the result of a running account between the plaintiff and defendant, it is not necessary in an action for money had and received, that the plaintiff should produce the running account, and prove all the items thereof, but he may prove any isolated receipt of money by the defendant,

and claim a verdict for the amount, unless satisfaction in some way of receipt can be shewn. *Planters' Bank vs. Farmers and Mechanics' Bank*, - - - - - 449

MORTGAGE.

1. By the deed of mortgage, the legal estate becomes vested in the mortgagee, defeasible at law upon the performance of the condition and payment of the money at the time stipulated; but upon default of the mortgagor in the non-payment of the money at that time, it becomes indefeasible at law, and defeasible only in equity, where the mortgage is considered only as a security for the debt and the mortgagor notwithstanding his default will be permitted to redeem. *Iglehart vs. Merriken*, - - - - - 39
 2. The issue of a mortgaged slave, born after the title of the mortgagee has become absolute at law, and during the possession of the mortgagor, is liable for the payment of the mortgage debt; and such issue may be sold upon a bill filed to enforce payment, although no specific notice of the issue is taken in the bill, - - - - - *Ib.*
 3. The assignee of the mortgagor of personal property, cannot plead limitations to the bill of the mortgagee claiming a sale of the mortgaged property for the payment of his debt, when the mortgagee had no knowledge of his adversary claim for a sufficient time to make the bar available, - - - - - *Ib.*
- Lien, 1.

NUL TIEL RECORD.

See Plead and Pleadings, 10, 11.
Practice, 8.

OFFICERS' FEES.

See Sheriff, 9, 10.

ORPHANS COURT.

1. An order passed by the Orphans court directing the administrator to sell the slaves of the testatrix, is not evidence of the insufficiency of the other personal assets, in opposition to the petitioner's right to freedom. *Wilson vs. Negro Ann Barnett*, - - - - - 159
2. Though this court feels itself bound to shield a trustee, in the honest and faithful discharge of his duties,

it is also bound to exercise a vigilant care in protecting the interests of those, who, from their tender years, are incapable of protecting themselves. *Jenkins vs. Waller*, 218

3. Thus where a guardian had received a sum of money belonging to his ward, and on the day of its receipt, had deposited it in a banking institution then in good credit, but which subsequently failed, and taken a certificate therefor, payable to himself or order; it was held, that the loss resulting from the failure of the bank should fall upon him, though on the day of the deposit, by endorsement on the certificate, he declared it to be the property of his ward, and placed in bank for his benefit, - - - *Ib.*
4. If in such a case the party making the deposit had failed before the bank, the money deposited would have enured to the benefit of his creditors, and the ward must have sustained the loss; and although the exhibition of the endorsement on the certificate might have defeated the claims of creditors, the bank itself might have applied the fund in satisfaction of any claim due it from the depositor, - - - *Ib.*
5. *Quere*, whether the guardian would have been protected, if, without the sanction of the Orphans court, he had deposited the money in the name of his ward, - - - - - *Ib.*
6. The Orphans courts have exclusive cognizance in the appointment of administrators, *de bonis non*, and where an executor had not completed his trust, by the payment of all legacies and the delivery over of the property in his hands to the persons entitled, the exercise of the power of appointment was held to be rightful. *Alexander vs. Stewart, et al*, - - - - - 226
7. It is the duty of an administrator, *de bonis non*, thus legitimately clothed with authority, to take possession of the effects of the deceased testator, existing specifically; return an inventory thereof to the Orphans court, and to distribute the same among the parties entitled, according to their respective rights; and with the due exercise of this lawful authority, no tribunal can rightfully interfere, *Ib.*
8. The inadequacy of the sureties in an administration bond, may under

certain circumstances, furnish a basis for the ancillary jurisdiction of a court of equity in restraining the authority of an administrator, until the Orphans court can inquire into the subject, and secure the parties concerned, by demanding new security, - - - - - *Ib.*

9. So the Orphans courts are the exclusive judges of the sufficiency of the penalty of the bonds required of executors and administrators, and the court of Chancery cannot, in this respect, review their determinations, - - - - - *Ib.*

10. Property remaining specifically after the death of the original executor or administrator, is unadministered property; and the appointment of an administrator, *de bonis non*, in such case, is indispensably necessary to give title to the distributees, even though all the debts are paid, and if, in such circumstances, the administrator of the first executor transfers the property to the distributees, their possession is liable to be divested by the subsequent grant of letters *de bonis non*, - - - - - *Ib.*

11. A court of Chancery has no power to vest property so situated in the distributees, except through the medium of such administrator, whose duty it is, after the return of an inventory, if the debts are paid, to transfer the property to the parties entitled without delay, - - - *Ib.*

12. Upon a petition for freedom, the petitioners, to establish their right thereto, offered to prove, the due execution of a paper, purporting to be the last will and testament of their former owner, by which they claim to be manumitted. But it appearing that the same paper had been exhibited in the Orphans court for probate, and probate refused, upon a caveat being filed thereto, by the next of kin, the county court rejected the evidence as inadmissible, and this court, upon appeal, affirmed the judgment. *Negro John vs. Morton*, - - - - - 391

13. A will of personal estate, which the Orphans court has refused to admit to probate, cannot afterwards be proved in the county court, *Ib.*

PAROL AGREEMENT.

See Court of Chancery, 10.

PETITION FOR FREEDOM.

1. L, the owner of a female slave, declared by deed of manumission, duly executed and recorded in 1803, that she should be free, at thirty years of age, "and in case the said negro girl may, hereafter, have a child or children, before she arrives at the age of thirty, that then such child or children shall be free, at their birth." *Held*, that under the act of 1796, ch. 67, sec. 13, the children of the said female slave, at their birth, not being able to work and gain a sufficient maintenance could not be liberated. *Anderson vs. Negro Julia*, - - - - - 32

2. Proof that a negro woman had been living and acting as a free person from the 27th of July, 1830, to the 11th of October, 1836, does not furnish any evidence whatever in support of her claim to freedom, unless it can be shown, that the party entitled to her custody and service, knew of her place of residence during the period of her so living and acting. *Wilson vs. Negro Ann Barnes*, - - - - - 159

3. Thus, where it was in proof, that the petitioner, who was born the slave of a testatrix, who lived and died on the Eastern Shore of Maryland, lived as a free woman in the City of Baltimore, for the period above mentioned, and who, by the will of the testatrix, was entitled to her freedom, if the residue of the personal estate was sufficient to pay her debts: *Held*, that her so living did not furnish *prima facie* evidence of the sufficiency of said residue for that purpose, or any evidence upon which a direction to that effect could be given to the jury, there being no proof that the personal representative of the testatrix was aware of her residence, - - - *Ib.*

4. An order passed by the Orphans court, directing the administrator to sell the slaves of the testatrix, is not evidence of the insufficiency of the other personal assets, in opposition to the petitioner's right to freedom, - - - - - *Ib.*

5. Upon a petition for freedom, the petitioners, to establish their right thereto, offered to prove, the due execution of a paper, purporting to be the last will and testament of their former owner, by which they claim to be manumitted. But it

appearing that the same paper had been exhibited in the Orphans court for probate, and probate refused, upon a caveat being filed thereto by the next of kin, the county court rejected the evidence as inadmissible, and this court, upon appeal, affirmed the judgment. *Negro John vs. Morton*, - - - - - 391

A will of personal estate, which the Orphans court has refused to admit to probate, cannot afterwards be proved in the county court.

PLEAS AND PLEADINGS.

1. Where by the pleadings the issue was, whether a guardian had collected and received certain moneys claimed for his ward; evidence proposed to be offered by the defendant to establish the fact, that the guardian had discharged himself by the payment of the amount proved to be in his hands, to a successor legally qualified to act, was held to be foreign to the issue, and therefore inadmissible. *Clarke vs. State*,
111

2. In an action of *debt*, by the appellant against the appellee, on a policy of insurance issued by the latter, guaranteeing to the bearer on a day named, the sum of \$5,000, on presenting the same at the office of the company; it was held, on special demurrer to the declaration, in which the plaintiff averred, that he was the bearer of the policy, and that the same was presented on the day named, but was not paid, that the action might be maintained. *Ellicott vs. United States Insurance Company*, - - - - - 166

3. That such an instrument was as much the representative of money as exchequer bills, bank notes, bills of exchange, or promissory notes, payable to bearer, or endorsed in blank, and as such passed by delivery. That possession was *prima facie* evidence of title, and when sued on by the holder, it need not be averred, that the defendant made the policy with the plaintiff; or with whom it was made, or by whom the securities were deposited and premium paid; or that the plaintiff was the bearer at the time it was made, or when he became such bearer; or that he was the bearer thereof on the day it fell due,

and presented it for payment at the office of the defendant, - - *Ib.*

4. The declaration stated that the defendants in consideration of the sum of \$33 33, to be paid by the plaintiff to the defendants, undertook safely and securely to take a certain schooner or vessel on board which the plaintiff had laden, "certain goods, chattels, wares, and merchandise, from, and out of the ice, and from and out of the harbour and port of *Baltimore*," &c. which goods, &c. it was alleged, were lost in consequence of the neglect and refusal of the defendants to perform their promise. Held, on motion in arrest, after verdict, that the declaration was defective, because it did not allege any consideration for the defendants' promise; no agreement or promise on the part of the plaintiff to pay the \$33 33, being averred. 2d. That upon the case made by the declaration, it was not necessary to allege the payment of the money; the performance of the defendants' agreement, being a condition precedent to their right to demand the remuneration. 3d. That the general description of "goods, chattels, wares, and merchandise," was insufficient, and that a definite description should have been given of the cargo. *The Pennsylvania, &c. Co. vs. Dandridge*, - - 248
5. Where the declaration charges, that the injury sustained by the plaintiff, is the result of the total neglect and refusal of the defendant to perform his engagement; evidence of a negligent and imperfect performance is inadmissible, and by implication contradictory of the charge. Under such a declaration the right of the plaintiff to damages is limited, to such as naturally result from defendants' total neglect and refusal to perform their contract, and they cannot be inflamed by evidence of a negligent performance, - - - - - *Ib.*
6. A declaration which alleges a contract to tow a vessel and cargo out, safely and securely, is not supported by proof of a contract to tow out free from a particular description of danger, - - - - - *Ib.*
7. In the one case, the contract would cover a loss from any and every cause, while in the other, there

- could be no recovery, unless the loss arose from the danger particularly named in the contract, *Ib.*
8. *Quere*, whether a declaration alleging an act to be performed in consideration of the payment of \$33 33, is sustained by proof that \$33 33½ was the sum to be paid? - - *Ib.*
9. Since the act of 1825, ch. 117, questions of variance between the allegation and the proof cannot be raised in this court, unless they were made in the court below, *Ib.*
10. When the existence of a record of a court is put in issue on the plea of *nul tiel record*, in proceedings of the same court, it should be proved by the production of the record itself for inspection by the judges; and when the record denied by the issue is of another court, it is to be proved by the production of an exemplification of it. *Boteler and Belt vs. State*, - - - - - 359
11. Upon the trial of the issue of *nul tiel record*, a file of papers and proceedings which had originated on the equity side of *Prince George's* county court, but which were subsequently removed to the court of Chancery, under the act of 1831, ch. 309, were offered by the plaintiff in support of his replication, averring them to be proceedings of the county court; and it not appearing that any action had been had upon them by the chancellor, or that they had been recorded in either court: It was *held*, that they were properly pleaded as proceedings of the county court; and that it was competent for the court, before whom they were so produced, by inspection, to ascertain and determine if they were the genuine original papers and proceedings of that court, stated and referred to in the replication, - - - - *Ib.*
12. In an action upon a bond, given by a trustee appointed by the decree of a court of equity, for the sale of certain mortgaged premises; it was held upon demurrer, that a replication alleging that the auditor had, under an order of the court, reported a certain sum to be due to the creditors of *H. M. C. & Co.* which the court had directed to be paid accordingly, and when the creditors were neither named in the report of the auditor, the order of the court or the replication, nor the amount to be paid to each, that the

- replication was ill, and that no judgment could be rendered thereon for the plaintiff, - - - - - *Ib.*
13. The auditor in his account, should have set out the proper names of the creditors of *H. M. C. & Co.* and the amount to which each was entitled, and the replication (supposing the creditors competent to sue jointly,) should have done the same thing, - - - - - *Ib.*
14. In pleadings on the part of plaintiffs "certainty to a certain intent in general," is required, as well in relation to the parties as the subject matter, that the defendant in a subsequent action may be enabled to plead it in bar, - - - - *Ib.*
- See Court of Chancery*, 24, 25.

PRACTICE.

1. The county court in this cause having refused to issue a *hab. fac. pos.* and this court having reversed their judgment, ordered a *procedendo*. That writ having been issued, the court here countermanded the *procedendo* at the next term, and awarded a writ of *hab. fac. pos.* to issue from this court. *McMechen vs. Marman*, - - - - - 57
2. Evidence of a variety of facts and circumstances offered by the plaintiff, to repel the proof which the defendant proposed to adduce, was held to be inadmissible as foreign to the issue, and the county court erred in admitting it; but as such proof could not have influenced the minds of the jury in finding upon the issue submitted to them, this court would not for such error reverse the judgment, the plaintiff in whose favour the verdict was rendered having offered uncontroverted evidence in support of the issue on his part. *Clarks vs. State*, 111
3. The defendant having given notice to the plaintiff's attorney at 4 o'clock, P. M. on Monday, the first day of the term, to produce a paper to be read in the trial of the cause, which came on, on the following Wednesday; it was held to be sufficient notice to let in secondary evidence of its contents, though it was admitted that the paper was in the possession of the plaintiff himself, and that the attorney did not see him until the intervening Tuesday, at a quarter past 4 o'clock, P. M. *Divers vs. Fulton*, - 202

4. Before secondary evidence of the contents of a written instrument can be offered, the notice to produce the original must appear to the court to be reasonable in point of time, so as to give the adverse party an opportunity to produce the paper called for, - - - *Ib.*
 5. Where evidence had been offered for the purpose of establishing a parol gift of a negro slave by a deceased testatrix to the plaintiff; and the defendant had read to the jury a letter from the plaintiff to him, written subsequently to the date of the will of the testatrix, inconsistent with the idea of exclusive property in the plaintiff; the defendant was permitted to read the will, though executed after the alleged gift, for the purpose of explaining the plaintiff's letter, and showing his recognition of the right of the testatrix to bequeath the property, *Ib.*
 6. It is no ground for refusing a prayer that the party has asked of the court, less than he was entitled to. *The Pennsylvania, &c. Co. vs. Dandridge*, - - - - - 248
 7. Any informality in the proceedings of a sheriff upon an execution is examinable on motion, upon its return. *Marshall's Lessee vs. Greenfield*, - - - - - 349
 8. It is the practice of the courts in this State, to decide on the plea of *nil tiel record* of the same court, not by inspection of a record actually made up and produced; but on an inspection of the docket entries, minutes of the court's proceeding, original papers, &c. on file in the cause, the judgment or decree in which is put in issue, treating them as the record of the court; which practice this court is not disposed to disturb. *Boteler and Bell vs. State*, - - - - - 359
- See Amendment, 1.

POLICY OF INSURANCE.

See Pleas and Pleading, 2, 3.

PRACTICE IN CHANCERY.

1. It is no objection to a decree for the sale of real estate, for the purpose of distributing the proceeds among the parties entitled, that the interest of a party to the proceedings to a portion of the proceeds, has not been sustained by proof. *Cahwell vs. Boyer*, - - - 136
2. It in such a case however, is necessary that the parties litigant, should prove their title to the property to be sold; but when there was nothing in the proceedings putting their title in issue, *prima facie* evidence was deemed sufficient to support the jurisdiction of the court, - - - - - *Ib.*
3. Since the act of 1832, ch. 302, all objections to the competency of witnesses, and the admissibility of evidence must be raised by exceptions filed in the court of Chancery, or county courts as courts of equity; and no point relating to either shall be raised, or noticed, or determined, or acted upon, by the Court of Appeals, unless it shall clearly appear in the record, that such point had been raised by exceptions as aforesaid, - - - - - *Ib.*
4. Where the court below certified, that a bill had been taken *pro confesso*, against a defendant, and an *ex parte* commission issued, because he had failed to answer according to the rules of the court; and such rules were not in the record, nor the time of holding its intermediate equity terms prescribed by law; this court will assume the verity of such certificate, and presume that the order *pro confesso*, was legitimately passed, - - - *Ib.*
5. When a supplemental bill is filed to bring in a new party in interest, such new party alone should be made to respond to it, - - - *Ib.*
6. The answer of one defendant is not evidence against a co-defendant, even as to matters in contest between the complainant and such co-defendant; and much less would such answer be evidence, in adjudicating upon the conflicting claims of the defendant's *inter se*, - - - *Ib.*
7. According to the well settled practice in the court of Chancery of Maryland, the issuing and service of a subpoena always precedes the issuing of a commission to take the answer of infants; but a departure from this practice, cannot be made the ground for the reversal of a decree in the appellate court; though at the proper time and for the appropriate purpose, it might have been made the subject of a motion in the court below, - - - *Ib.*

8. The act of 1825, ch. 117, does not require exceptions to be filed to the auditor's statement, made for the purpose of exhibiting the rights of the parties, as they have been solemnly adjudicated by the chancellor by a previous order. *Miller vs. Allison, et al*, - - - - 35
9. The ordinary statements of the views and opinions of the auditor upon the rights of the parties, designed to give them an opportunity, more distinctly to present to the chancellor the matters in contest, are within the act of 1825, ch. 117, and should be excepted to in the court of Chancery, - - - - *Ib*.

PRINCIPAL AND AGENT.

1. The county court in instructing the jury, as to the facts which it would be necessary to find, to shew an adoption and ratification by the defendants, of the contract alleged to have been made by their agent, said, that if the consideration for such contract had been received by the agent, and paid over to the defendants, who retained the same, that then the said facts are in law an adoption of the contract, and as binding on them as if a previous authority had been given the agent. This instruction was held to be erroneous; first, because the jury was not required to find, that the defendants *knew* on what account the money was paid them,—and second, that the defendants knew the terms of the contract on which the money was received. *The Pennsylvania, &c. Co. vs. Dandridge*, 248

PROCEDENDO.

See Practice, 1.

RECORDS.

1. When the existence of a record of a court is put in issue on the plea of *nul tiel record*, in proceedings of the same court, it should be proved by the production of the record itself for inspection by the judges; and when the record denied by the issue is of another court, it is to be proved by the production of an exemplification of it. *Boteler and Belt vs. State*, - - - - 359
2. It is the practice of the courts in this *State*, to decide on the plea of *nul tiel record* of the same court,

not by inspection of a record actually made up and produced; but on an inspection of the docket entries, minutes of the court's proceedings, original papers, &c. on file in the cause, the judgment or decree in which is put in issue, treating them as the record of the court; which practice this court is not disposed to disturb, - - *Ib*.

3. The duty required of clerks and registers by the seventh section of the act of 1817, ch. 119, to make up the records of the judgments, &c. therein mentioned, within twelve months, was not to give validity to such judgments, &c. but for security, and to furnish the ready and convenient means of evidence in other courts, - - *Ib*.
4. Upon the trial of the issue of *nul tiel record*, a file of papers and proceedings which had originated on the equity side of *Prince George's* county court, but which were subsequently removed to the court of Chancery, under the act of 1831, ch. 309, were offered by the plaintiff in support of his replication, averring them to be proceedings of the county court; and it not appearing that any action had been had upon them by the chancellor, or that they had been recorded in either court. It was *held*, that they were properly pleaded as proceedings of the county court; and that it was competent for the court, before whom they were so produced, by inspection, to ascertain and determine if they were the genuine original papers, and proceedings of that court, stated and referred to in the replication, - - - - *Ib*.

RENTS AND PROFITS.

See Dower, 1, 2, 4, 5, 6.

REPLEVIN.

In actions of *replevin*, the proceedings with reference to the possession, are regulated with exact minuteness by the acts of assembly. Upon the return of the writ, the court is commanded to entertain the question of possession, as a preliminary question altogether independent of the title; and to return the property to the defendant, unless it shall appear that his possession was forcibly or fraudulently obtained, or that the possession first being in

the plaintiff, was got or obtained by the defendant without proper authority or right derived from the plaintiff. On this preliminary question the whole matter of fraud may be investigated as fully as in a court of Chancery. *Glenn and Kennedy vs. Fowler, et al.* - - - 340

ROADS.

See Corporation.

SALES OF PERSONAL PROPERTY.

1. A bill of sale of personal property, duly executed, acknowledged and recorded, is as valid and effectual to pass the legal title to the vendee, as if there was an actual delivery of the property transferred. *Clary and Clary vs. Frayer*, - - - 398
2. The vendee in such case is clothed with the constructive possession, and is legally competent to convey it to any third person, - - *Ib.*
3. The enrolment is a substitute for, and takes the place of actual delivery, and repels all those imputations of fraud, which would arise from the retention of possession by the grantor, - - - *Ib.*
4. J. E. being the owner of a horse and other articles of personality, by bill of sale, dated 23d January, 1833, and duly executed, acknowledged and recorded, conveyed the same to W; the vendor retaining the possession. W. on the 31st December, of the same year, by assignment, endorsed on the instrument, transferred for a valuable consideration which was paid, all his right and title to the property therein mentioned to A. and H. which assignment was also acknowledged before a justice of the peace; and on the same day, went to the house of J. E. where the property, except the horse then was, and delivered several of the articles to A. and H. saying to them, "you will surely get the said black horse—go and get him wherever he may be." *Held* to be sufficient to pass the property to A. and H. the plaintiffs, and to enable them to support *replevin*, against a party who claimed under a subsequent sale, made under execution against the original vendor, - - - *Ib.*

SHERIFF.

1. As soon as a writ of *fiery facias* is delivered to a sheriff, in contemplation of law, it attaches itself to the bond, which gives him authority to act as such for the time being, and if a default is committed upon such writ, the party injured must sue that bond. *State use Robey vs. Turner*, - - - 125
2. Two writs of *fiery facias*, at suit of the same party, were placed in the hands of the sheriff on the 24th of November, 1828, and laid, the one on the 6th of December, of the same year, the other, on the 21st of January, following. On the 17th of May, 1830, the sheriff levied upon these writs the sum of \$1,100, which he made default in not paying over, and the party entitled, thereupon, brought suit upon his bond executed on the 8th of December, 1829. *Held*, that the right to recover was not upon the bond sued on; but that the remedy of the party was upon that bond, which clothed the sheriff with official authority at the time the writs were placed in his hands, - - - *Ib.*
3. Any informality in the proceedings of a sheriff upon an execution, are examinable on motion, upon its return. *Marshall's lessee vs. Greenfield*, - - - 349
4. A judicial sale, made by a sheriff, for the purpose of carrying into effect the judgment of a competent tribunal, is a proceeding which the law regards with favour, and although it will not give effect to an instrument or paper, executed by such officer, if its terms are unmeaning, or so entirely vague as to make it uncertain what was intended; yet every reasonable intendment will be made to secure *bona fide* purchasers, and to effectuate the object, which it was the duty, and as the law presumes, the design of the officer to accomplish, - - *Ib.*
5. The presumption in such a case is, at least, as proper and strong as in the case of a grantee claiming against a grantor, when the utmost effect is given to the terms of the grant, *ut res magis valeat quam pereat*, - - - *Ib.*
6. In an action of ejectment by a party claiming under a sheriff's sale, the following description, in the

schedule of the property sold, was held to be sufficient:

"To one, of land, called and known by the name of "Indian Creek, with Addition," containing 217 acres, more or less," - - - *Ib.*

7. A bond given to a sheriff by his deputy, the penalty of which was expressed to be, in "current money of the *United States*," is a valid and binding instrument, and a motion in arrest of judgment upon the ground that no such currency is known to the laws overruled. *Hall vs. Bell*, - - - - - 470

8. Poundage fees due a sheriff, may, after the return of the writ be collected, as other officers' fees, under the act of 1779, ch. 25, and its supplement, - - - - - *Ib.*

9. It is not necessary that officers' fees should be sent out for collection, in the year next after the performance of the services, and since the act of 1822, ch. 219, they need not be delivered at any particular period of the year, - - - *Ib.*

SLAVES.

1. The act of assembly prohibiting the bringing or importing into this state of slaves for sale or to reside, provides, that persons brought into the state contrary to the act, if slaves before, shall thereupon immediately be free; but to entitle the slave to his freedom in such case, the bringing into the state, must be shown to be by the owner, or by his authority, or with his approbation. If a stranger without the authority or approbation of the master, bring a slave into the state, such slave is not entitled to his freedom. *Pocock vs. Hendricks*, 421

2. In an action of *trover* for the value of a negro, sold, and converted by the defendant to his own use, it would be competent to him, under the plea of not guilty, to prove the right of the negro to his freedom. *Newton vs. Turpin's Adm'rs*, 433

3. The legislature of Delaware in 1787, passed a law, declaring that all slaves carried into that state, after its passage, for sale, should be free; with a proviso, that it should not extend to or affect persons removing into that state, from any other state with their families, or becoming residents thereof, &c. *Held*

that persons removing into Delaware from the District of Columbia, were within the spirit and intention of the proviso, which was to encourage persons to remove with their slaves and settle in the state, and that consequently their rights of property were protected by it, *Ib.*

4. In construing a law in reference to rights of property, the same strict and literal interpretation is not adopted, as is on some occasions resorted to, in reference to grants of special limited jurisdiction, *Ib.*
See Ex'rs and Adm'rs, 5, 6.

TOBACCO.

1. Under the provisions of different acts of assembly, some of them passed more than a century ago, and when tobacco passed as currently as money, *assumpsit* will lie in this state, as well for tobacco (where the contract is for payment in tobacco) as for current money, and in some such cases, judgments have been rendered for tobacco. *Marshall vs. McPherson*, - - 333

TROVER.

1. If the instrument under which the plaintiff claims in an action of *trover*, is proved, or conceded to have been obtained by fraud, it is of no validity; and the defendant may rely upon such invalidity as a bar to the action. *Pocock vs. Hendricks*, - - - - - 421

2. In an action of *trover* for the value of a negro, sold, and converted by the defendant to his own use, it would be competent to him, under the plea of not guilty, to prove the right of the negro to his freedom. *Newton vs. Turpin's Adm'rs*, 433

TRUSTS.

See Dower, 3.

TRUSTEE.

See Orphans Court, 2, 3, 4, 5.

USAGE.

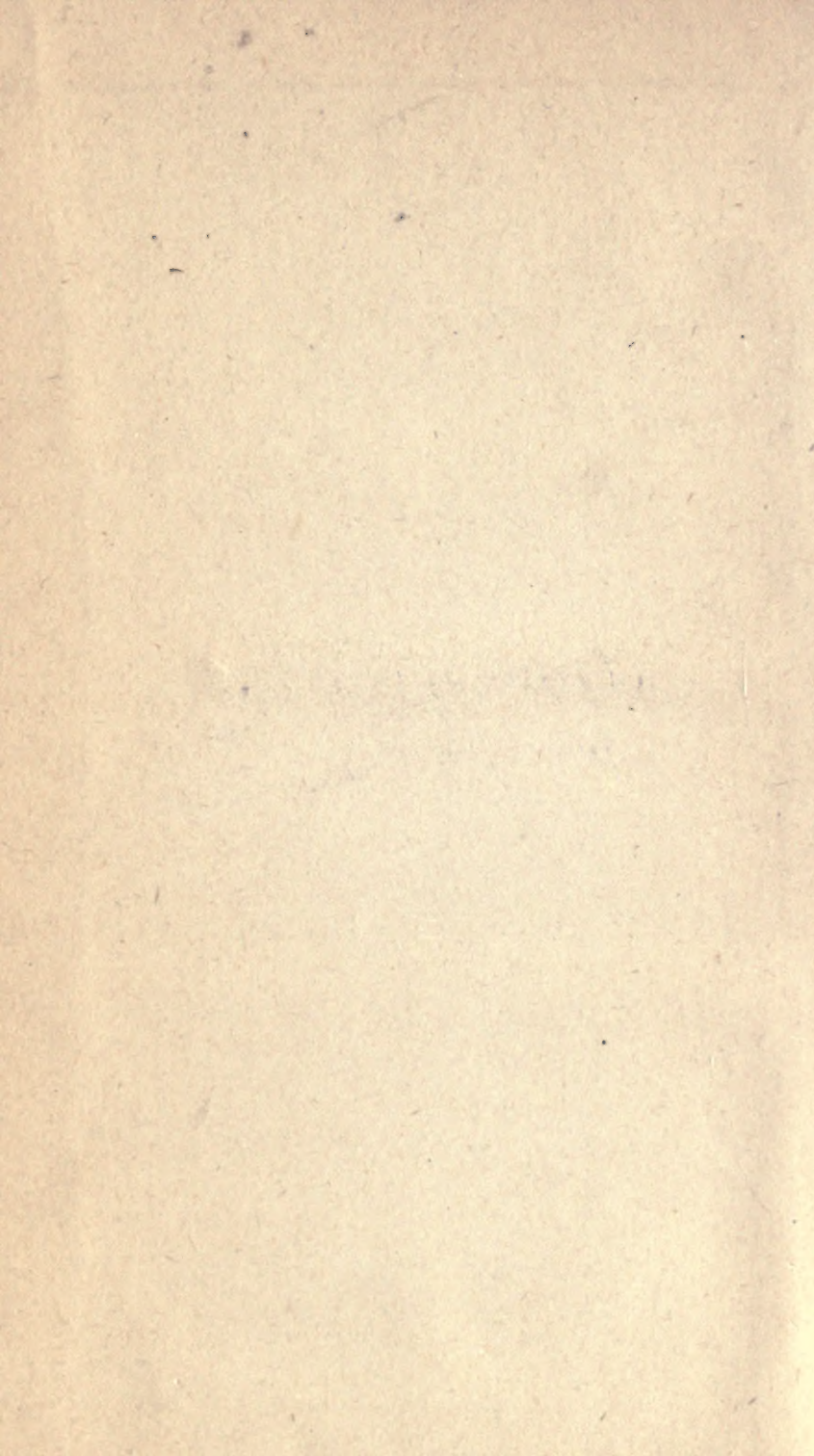
1. The usage of banks in regard to the manner in which current deposits, and the proceeds of notes and drafts placed with them for collection are paid, not being in proof, nor heretofore proved and established in courts of justice, cannot be

judicially known, or sanctioned as general mercantile usages, which are a part of the law of the land. *Planters' Bank vs. Farmers and Mechanics' Bank*, - - - - 449

2. A usage established by proof, that current deposits made in a bank, and the proceeds of notes and drafts placed for collection, are to be paid to the depositor, upon demand, at the counter of the bank, would prevent the running of the act of limitations against such de-

positor, until payment of his claim had been refused, or some act done with his knowledge, dispensing with the necessity of a demand, *Ib.*

3. Such dispensation would be furnished by the suspension of specie payments, and discontinuance of banking operations, by the bank, provided, those acts were known to the plaintiff, and from the time of such knowledge, the statute of limitations would begin to run, *Ib.*



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